

No. 88-6546-CFH
Status: GRANTED

Title: Albert Duro, Petitioner

v.
Edward Reina, Chief of Police, Salt River Department
of Public Safety, Salt River Pima-Maricopa Indian
Community, et al.

Docketed:
January 31, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Trebon, John

Counsel for respondent: Wilks, Richard B.

Entry	Date	Note	Proceedings and Orders
1	Jan 31 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 4 1989		Brief of respondents Chief of Police Reina, et al. (PRINTED) in opposition filed.
5	Mar 9 1989		DISTRIBUTED. March 24, 1989
6	Mar 21 1989		Reply to respondent's brief in opposition requested March 21, 1989. Due April 4, 1989 (CJ)
7	Mar 23 1989		Reply brief of petitioner Albert Duro filed.
8	Apr 6 1989		REDISTRIBUTED. April 21, 1989
10	Apr 24 1989		Petition GRANTED. *****
11	May 8 1989	G	Motion of petitioner for appointment of counsel filed.
13	May 8 1989		Order extending time to file brief of petitioner on the merits until August 7, 1989.
14	May 12 1989		DISTRIBUTED. MAY 18, 1989. (MOTION FOR APPOINTMENT OF COUNSEL).
15	May 22 1989		Motion for appointment of counsel GRANTED and it is ordered that John J. Trebon, Esquire, of Flagstaff, Arizona, is appointed to serve as counsel for the petitioner in this case.
16	Jul 6 1989		Joint appendix filed.
19	Aug 7 1989		Brief amicus curiae of Salt River Project Agricultural Improvement and Power Dist. filed.
20	Aug 7 1989		Brief of petitioner Albert Duro filed.
18	Aug 8 1989		Order extending time to file brief of respondent on the merits until September 26, 1989.
21	Aug 15 1989	D	Application (A89-153) by Petitioner to file a Petitioner's brief on the merits in excess of page limits, submitted to Justice O'Connor.
25	Aug 15 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Aug 28 1989		Application (A89-153) denied by Justice O'Connor.
23	Sep 11 1989		Order further extending time to file response to petition until October 6, 1989.
24	Sep 15 1989		Record filed.
		*	one vol.-USCA9.
26	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1989. (3RD CASE)
27	Oct 6 1989	G	Motion of Rosebud Sioux Tribe, et al. for leave to file

Entry	Date	Note	Proceedings and Orders

			a brief as amici curiae filed.
28	Oct 6 1989		Brief of respondents Chief of Police Reina, et al. filed.
29	Oct 6 1989		Brief amicus curiae of United States filed.
30	Oct 6 1989		Brief amicus curiae of Six American Indian Tribes filed.
31	Oct 6 1989		Brief amici curiae of Sac and Fox Nation, et al. filed.
33	Oct 6 1989		Brief of respondents Chief of Police Reina, et al. filed.
32	Oct 25 1989		CIRCULATED.
35	Oct 27 1989	G	Application (A89-320) to extend the time to file a reply brief from November 5, 1989 to November 7, 1989, submitted to Justice O'Connor.
34	Oct 30 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
36	Oct 30 1989		Application (A89-320) granted by Justice O'Connor extending the time to file until November 6, 1989.
37	Nov 6 1989		Motion of Rosebud Sioux Tribe, et al. for leave to file a brief as amici curiae GRANTED.
38	Nov 6 1989	X	Reply brief of petitioner Albert Duro filed.
40	Nov 25 1989	D	Motion of New Mexico, et al. for leave to file a brief as amici curiae out-of-time filed.
39	Nov 29 1989		ARGUED.
41	Dec 4 1989		Motion of New Mexico, et al. for leave to file a brief as amici curiae out-of-time DENIED.

EDITOR'S NOTE

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

88-6546

ORIGINAL

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,

Respondents.

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANOL, JR.
CLERK

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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January 31, 1989

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QUESTIONS PRESENTED

- (1) In light of the fact that Indian tribes cannot exercise criminal jurisdiction over non-Indians, does the Salt River Pima-Maricopa Indian Tribe have criminal jurisdiction over Albert Duro, a nonmember, Cahuilla Indian who not only lacks tribal membership, but is excluded from the political processes of the Tribe and is similarly situated with non-Indians?
- (2) Are the "equal protection" guarantees of the Indian Civil Rights Act violated if Indian tribes are precluded from exercising criminal jurisdiction over nonmember non-Indians, but may exert jurisdiction over similarly situated nonmember Indians based solely on race?
- (3) May Albert Duro, a Cahuilla Indian, be subjected to the criminal jurisdiction of the Salt River Pima-Maricopa Indian Tribe because his girlfriend was a tribal member and he temporarily resided on the Salt River reservation? Can criminal jurisdiction over nonmember Indians be predicated, on a case-by-case basis, because of significant "contacts" between the accused and the Indian tribe?

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Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,

Respondents.

The petitioner, Albert Duro, by and through his attorney, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 821 F.2d 1358 (9th Cir. 1987). An Amended Opinion was issued by the Court of Appeals for the Ninth Circuit on June 29, 1988, and is reported at 851 F.2d 1136 (9th Cir. 1988). Both decisions vacate the judgment and reject the written decision of Judge Copple, United States District Court for the District of Arizona. On November 2, 1988, the Court of Appeals issued an order denying Mr. Duro's petition for rehearing and rejecting his suggestion for rehearing en banc. Circuit Judge Kozinski, joined by Circuit Judges Leavy and Trott, dissented from the order denying rehearing en banc. The memorandum and order of the District Court, the original opinion of the Ninth Circuit, the amended opinion of the Ninth Circuit, and the order denying rehearing are included within the appendix to this petition.

JURISDICTION

The amended opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed on June 29, 1988. The order denying Mr. Duro's petition for rehearing and suggestions for rehearing en banc was entered on November 2, 1988. The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under Title 28 U.S.C. Secs. 1254(1) and 2101(c).

STATEMENT OF THE CASE

Albert Duro was born in Riverside, California, on June 17, 1958. He is a United States citizen and a permanent resident of California. Mr. Duro was raised on private land outside of any reservation environment and has always been subject to California civil and criminal jurisdiction. He is an enrolled member of the Cahuilla Indian Tribe and a living remnant of that tribe which has mixed and assimilated with the dominant cultures of southern

California for over two hundred years. He is a commonly referred to as a Mission Indian.

Mr. Duro met Debbie Lackey, a member of the Salt River Pima-Maricopa Indian Community (hereinafter referred to as the "Salt River Tribe" or the "Tribe") in California. She too was raised in southern California apart from her tribe. They lived together in California on an intermittent basis from 1980-1983, but also lived together in Phoenix, Arizona, for a short period of time. In 1984, Mr. Duro worked for PiCopa Construction Co. (owned by the Salt River Tribe) for several months and lived on the Salt River Reservation for part of that time. Neither residency or membership within the Salt River Tribe is required for employment with PiCopa Construction Co.

Albert Duro was arrested near his home in California by federal agents on or about June 19, 1984. He and Wendel Lackey were charged with murder in the shooting death of Phillip Fernando Brown (a member of the Gila River Indian Tribe) by federal indictment dated July 25, 1984. The indictment was dismissed without prejudice upon request of the United States Attorney on September 17, 1984. The charges have never been refiled.

Mr. Duro was turned over to the custody of the Salt River Pima-Maricopa Indian Community by federal authorities on September 19, 1984, and charged with unlawful "discharge of firearms" within the boundaries of the Salt River Indian Reservation on June 15, 1984.¹ The offense allegedly occurred a few days after Mr. Duro had moved from the reservation and terminated employment with PiCopa Construction Co.

A motion to dismiss the complaint was considered by the Salt River Pima-Maricopa Indian Community Court (hereinafter referred to as the "Tribal Court"), but denied on October 19, 1984. The Salt River Tribe did not present any evidence to establish jurisdiction. Mr. Duro filed a verified petition for a writ of habeas corpus

¹The Salt River Reservation was established by Executive Order dated June 14, 1979, which amended an earlier order of January 10, 1979. It established a reservation for the Pima and Maricopa Indians.

and/or for a writ of prohibition on November 8, 1984, asserting, inter alia, that the tribal court did not have jurisdiction over him. He also sought a preliminary injunction to enjoin the tribal court from holding a scheduled trial on the charge against him.

The District Court issued its Memorandum and Order on January 8, 1985, which granted the requested relief to the Petitioner, Albert Duro. A judgment, approved as to form by Respondents, was entered in favor of Albert Duro on January 15, 1985. He was released from the custody of the Salt River Tribe, as ordered, immediately thereafter.

The District Court first ruled that the Salt River Tribe did not have criminal jurisdiction over Albert Duro, a nonmember Indian. Memorandum and Order dated January 8, 1985, at p.4. Then, the Court reviewed the equal protection challenge to the Tribe's prosecution of nonmembers, as opposed to non-Indians, and concluded that "discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." Memorandum and Order at p.5. The decision of the District Court emphasized the fact that nonmember Indians and non-Indians are similarly situated with non-Indians.

The Salt River Tribe filed an appeal on February 11, 1985, and the District Court granted a Certificate of Probable Cause on February 20, 1985.

A divided panel of the Court of Appeals for the Ninth Circuit issued a written decision on July 9, 1987. The majority opinion of the Court of Appeals reversed the decision of the District Court and found, in a case of "first impression", that the Salt River tribal court did possess criminal jurisdiction over nonmember Indians. Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987). Judge Sneed filed a dissenting opinion. Then, on June 29, 1988, the three-judge panel of the Court of Appeals issued an amended opinion. The three-judge panel preserved the same split. Both the majority and dissenting opinions of the panel were significantly revised. Duro v. Reina, 851 F.2d 1136 (9th Cir. 1988).

The majority Opinion of the Court of Appeals -- in a case of "first impression" -- brushed aside or dismissed the explicit language of several opinions of the Supreme Court limiting tribal court jurisdiction to tribal members as unwarranted "casual references." 851 F.2d 1136, 1141 (9th Cir. 1988). The majority Opinion conceded that the exercise of criminal jurisdiction over nonmembers was "virtually without historical precedent." 851 F.2d 1136, 1139 (9th Cir. 1988). Nevertheless, the two-judge majority found that the Tribe could exercise criminal jurisdiction over nonmembers based simply upon significant "contacts" between the nonmember Indian and the tribal community. 851 F.2d 1136, 1144 (9th Cir. 1988).

In spite of the Supreme Court's decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which found that Indian tribes do not possess criminal jurisdiction over non-Indians, the majority Opinion of the Court of Appeals rejected Mr. Duro's challenge that the distinction between non-Indians and nonmember Indians violated the "equal protection" clause of the Indian Civil Rights Act of 1968, Title 25 U.S.C. Sec. 1302(8) (1982 and Supp. IV 1986).

Mr. Duro's Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc was denied, over strong dissent, by the Court of Appeals on November 2, 1988. Circuit Judge Kozinski, joined by Judges Leavy and Trott, dissented from the denial of rehearing en banc. Judge Kozinski noted that the panel decision disregarded relevant Supreme Court authority, "is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals." 860 F.2d 1463 (9th Cir. 1988).

The Court of Appeals for the Eighth Circuit addressed an identical issue and rendered a decision directly contrary to the Duro decision prior to the filing of the Amended Opinion by the Ninth Circuit in this case. See Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988).

REASONS FOR GRANTING THE WRIT

I. This Court Should Accept Jurisdiction of Mr. Duro's Case in Order to Resolve a Conflict Between the Decision of the Court of Appeals for the Ninth Circuit and the Decision of the Court of Appeals for The Eight Circuit in Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988).

The decision of the divided panel in the Duro case is unquestionably surrounded by great conflict and dissent. The majority opinion in Duro admittedly decided a "troubling" decision of "first impression" that plunged it into "uncharted reaches of tribal jurisdiction". Duro v. Reina, 851 F.2d 1136, 1139 (9th Cir. 1988). The majority opinion in Duro is not only contrasted by a strong, dissenting opinion by Judge Sneed, but has also created an irreconcilable conflict with the Court of Appeals for the Eighth Circuit. In Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988), Chief Judge Lay wrote for a unanimous court in concluding that strong precedent from the United States Supreme Court precluded the creation of criminal jurisdiction in favor of tribal courts over nonmember Indians.

The Court of Appeals for the Eighth Circuit in Greywater held that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over enrolled members of the Turtle Mountain Band of Chippewa Indians. It is beyond question that the Duro and Greywater decisions create an irreconcilable conflict between the courts of appeals for the Eighth and Ninth Circuits.

The Duro and Greywater decisions are at odds with each other in many respects. The Eighth Circuit recognized that the question of tribal jurisdiction over nonmember Indians was essentially governed by the decision of the United States Supreme Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and its progeny.

Although Oliphant concerned only non-Indians, the Supreme Court relied upon an analysis which compels this court to conclude that the Sioux Tribal Court cannot charge and try nonmembers of the tribe, whether Indian or not. Quoting from a concurring opinion of Justice Johnson, the Oliphant Court specified the nature of the limitation of the overriding sovereignty of the United States:

"[T]he restrictions upon the right of soil in the Indians, amount * * * to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." Fletcher v. Peck, 6 Cranch 87, 147 (1810) (emphasis added).
Id. at 209

Greywater v. Joshua, 846 F.2d 486, 491 (8th Cir. 1988) (original emphasis). The view of the majority opinion in the Duro case regarding the applicability of Supreme Court precedent is not only at odds with the Eighth Circuit, but is also in conflict with strong dissenting opinions within the Ninth Circuit as well. See the dissenting opinion of Judge Sneed in Duro v. Reina, 851 F.2d 1136, 1146-1152 (9th Cir. 1988), and the dissenting opinion of Judge Kozinski, joined by Judges Leavy and Trott, from the order denying rehearing en banc. 860 F.2d 1463 (9th Cir. 1988).

Indeed, as highlighted by the dissenters within the Ninth Circuit, as well as, the unanimous decision from the Eighth Circuit, the failure of the majority opinion in the Duro case to acknowledge controlling Supreme Court precedent is troubling.

II. The Decision of the Court of Appeals for the Ninth Circuit has Disregarded Controlling Supreme Court Precedent. The Exercise of this Court's Power of Supervision is Appropriate.

In Oliphant, the Supreme Court held that tribal courts do not have jurisdiction over non-Indians "absent affirmative delegation of such power by Congress." 435 U.S. 191, 208 (1978). Subsequent Supreme Court decisions have determined, both in language and in principle, that the inherent, sovereign powers of an Indian tribe ends with criminal jurisdiction over its own members. Montana v. United States, 450 U.S. 544, 564-65 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161 (1980); United States v. Wheeler, 435 U.S. 313, 326 (1978).

The Supreme Court has often reaffirmed its holding in Oliphant and expressly stated that tribal courts are not vested with criminal jurisdiction over nonmembers. The express language utilized by the Supreme Court cannot simply be dismissed as arbitrary "casual references" as determined by the majority opinion in the Duro case. 851 F.2d 1136, 1141 (9th Cir. 1988).

Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. **And, as we have recently held, they cannot try nonmembers in tribal courts.** (cites omitted; emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978). Wheeler held that Indian tribes retain the sovereign power to prosecute tribal members. But the Supreme Court was careful to emphasize that Indian tribes do not have sovereign power over persons that are not members of the tribe. As emphasized by Judge Sneed in dissent,

It must be remembered that the [Supreme] Court no doubt considered Wheeler and Oliphant contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided Oliphant by rejecting the expansion of the authority of tribal courts over crimes by non-Indians, it would not have been surprising to have found the court in Wheeler using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in Wheeler. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its members. (original emphasis).

Duro v. Reina, 851 F.2d 1136, 1147 (9th Cir. 1988) (J. Sneed, dissenting). Judge Kozinski, joined by Judges Leavy and Trott, explicitly stated that the majority opinion in Duro "overlooks clear Supreme Court pronouncements to the contrary".

The panel laments the lack of Supreme Court guidance on the questions before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labeling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has chartered a clear course through these waters, a course that the Eighth Circuit had no difficulty following. Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988).

The course starts with Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the court held that tribes could not exercise criminal jurisdiction over non-Indians. Standing alone, Oliphant leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians who are not members of the forum tribe. A series of subsequent decisions have elaborated on Oliphant, however, effectively foreclosing this possibility.

860 F.2d 1463, 1463-64 (9th Cir. 1988) (J. Kozinski, dissenting from the denial of rehearing en banc.) At least one commentator has also concluded that the Duro decision inappropriately ignores controlling Supreme Court authority.

As the Duro court noted, the case raised a truly complex issue. Even so, one has difficulty reading the decision without feeling a sense of inadequacy in the court's rationale. Several aspects of the case are particularly troubling. First, the court's treatment of Oliphant, and its summary dismissal of Supreme Court language in post-Oliphant cases, overlooks those precedences' underlying theme of limiting retained sovereign power as the source of tribal criminal authority.

MacKay, Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?, 1988 Utah Law Review 379, 391 (1988). Mr. MacKay concludes that "it becomes apparent that Duro was incorrectly decided and that, absent congressional approval, tribal criminal jurisdiction should begin and end with the enrolled members of the governing tribe." 1988 Utah Law Review 379-409, 381 (1988).

As Judge Kozinski concluded:

As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. Greywater draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.

860 F.2d 1463, 1466 (9th Cir. 1988) (J. Kozinski, dissenting from the denial of rehearing en banc).

For instance, the unanimous decision in Wheeler, which explicitly defined the limits of criminal jurisdiction to tribal members, has been repeatedly emphasized, but perhaps not more fundamentally than in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979). Yet, the Duro decision virtually ignores the principled reasoning of the Supreme Court in the Confederated Tribe's case. See Duro v. Reina, 851 F.2d 1136, 1140 (9th Cir. 1988).

Although the Supreme Court was concerned with state and tribal taxing powers, it was significant that the court drew the line between permissible and impermissible state taxation of cigarette sales on the reservation on the basis of tribal membership. Previous case law established that the state of Washington could not impose a sales tax over purchases by tribal members on the reservation. Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973). In Confederated Tribes, the state was successful in arguing that the limitation on its taxing power is defined only by an infringement against tribal self-government or, in other words, with tribal membership.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the Reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the state's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the state from imposing its taxes. (emphasis added).

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980). The Court held that nonmember Indians are not entitled to the same state tax immunity enjoyed by tribal members, even though they may be tribal residents. Instead, nonmember Indians and non-Indians were treated similarly. In sum, the extension of tribal sovereignty and the limitation on the power of the states begins and ends with tribal membership.

Although virtually ignored by the Duro decision, the same points were highlighted in Montana v. United States, 450 U.S. 544 (1980). It held that the Crow Tribe of Montana could properly regulate hunting and fishing by nonmembers on land belonging to the tribe or held by the United States in trust, but that it had no power to do so on lands that had passed from the tribe and were now held in fee by nonmembers (through allotment). See Montana at n.8 & 9. The Supreme Court relied upon the principles annunciated in Wheeler:

Thus, in addition to the power to punish tribal offenders, the Indian Tribes retained their inherent power to determine tribal membership, to regulate domestic regulations among members, and to prescribe rules of inheritance for members.

But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. (emphasis added; cites omitted).

* * *

Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. (emphasis added).

Montana v. United States, 450 U.S. 544, 564-65 (1981). Again, the Court recognized that Indian tribes do possess attributes of sovereignty which encompass criminal jurisdiction over its own members and civil jurisdiction over its own territory. The exercise of power beyond internal affairs is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.

Other courts and commentators have interpreted Oliphant and its progeny in the same manner. See, e.g., Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988); United States v. Blue, 722 F.2d 383, 385-86 (8th Cir. 1983); J.W. Weil, Federal Indian Law, Annual Survey of American Law, 591-608, at p.597 (1979); K.J. Erhart, Jurisdiction Over Nonmember Indians on Reservations, Ariz. State Law Journal, 727-756 (1980).

III. The Duro Decision has Seriously Eroded the "Equal Protection" Guarantees of the Indian Civil Rights Act and Misconstrued the Meaning and Limits of "Indian Preference" Legislation.

The majority opinion in Duro is also "at odds with current equal protection analysis". 860 F.2d 1463 (9th Cir. 1988) (J. Kozinski, dissenting). The majority opinion holds that any distinction based upon Indian status is not a racial classification for purposes of equal protection analysis. 851 F.2d 1136, 1144 (9th Cir. 1988).

Although the Duro court cited Antelope and Mancari for its initial premise that legislative classifications directed at Indians are non-racial, these cases are largely inapplicable to the unique context of Duro. The governmental interest underlying these decisions do not apply where the distinction is made between non-Indians and nonmember Indians, as opposed to non-Indians and tribal members.

* * *

Yet Oliphant makes clear that under no circumstances can a non-Indian fall within the criminal jurisdiction of the tribe, save by congressional mandate. If nonmember Indians are not accorded the same exempt status, the only possible explanation is the defendant's race. It is well settled that classifications that operate to the disadvantage of a suspect class demand the most exacting standard of strict judicial review, and are almost invariably struck down.

MacKay, Indian Self Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?, 1988 Utah Law Review 379, 403-405 (1988). The denial of equal protection under the Indian Civil Rights Act by the Duro court is inconsistent with prior decisions of this court granting special concessions to "Indian preference" legislation enacted by Congress. Traditional equal protection analysis should apply to the distinction between non-Indians and nonmember Indians accorded by the Duro decision. Instead, the Duro decision turns "equal protection" on its head. Also see, R.W. Johnson and E.S. Crystal Indians and Equal Protection, 54 Wash. L.R. 591, 606 (1979); T.C. Kelly, Indians--Jurisdiction -- Tribal Courts Lack Jurisdiction Over Non-Indian Offenders, Wisc. L.R. 537, 564 (1979).

Albert Duro, but for his race, stands before this Court on equal footing with non-Indians. He is not eligible for tribal membership

in the Salt River Pima-Maricopa Indian Community. He cannot vote in elections held by the Salt River Community or hold elected office. See Article 2, Sec. 1 of the Constitution of the Salt River Community and Secs. 3-1 and 3-2 of the Salt River Community Code. The tribal code provides that only members of the Salt River Pima-Maricopa Indian Community shall serve as jurors in the tribal court. See Sec. 5-40 of the Salt River Community Code. In addition, Mr. Duro has no more connection to the language, culture, history or customs of the Tribe than would a non-Indian descendant.

It is therefore unfair for the Ninth Circuit to extend the criminal jurisdiction of the Tribe over Mr. Duro for no reason other than his race. Moreover, it is equally improper to classify all "Indians" together for purposes of criminal jurisdiction since the separate Indian tribes are often as distinct as Indians and non-Indians. The Ninth Circuit has nevertheless seemingly lumped all Indians together.

It is common practice in this country to consider all Indians to be, as one court put it, "fungible." Some would believe that no clear distinction need be drawn between the various tribes because "an Indian is an Indian is an Indian." Such misconceptions only add to the confusion. There are very distinct racial, ethnic, and cultural differences between one tribe and the next. Each tribe, much like an extended family, consists of members who share common ancestry and culture, and establishes consensual tribal laws and customs specifically tailored to their needs.

As often happens among neighboring sovereigns, many of these tribal families hold great animosity for one another. A prime example of this turbulence is found in the midwestern tribes of the Chippewa and Sioux. For centuries these tribes have resided in bordering regions under varying degrees of intertribal war and conflict. Such deep rooted feelings go a long way toward expunging the misconception of Indian "fungibility."

MacKay, supra., at pp. 400-01 (1988).

Traditional equal protection analysis has not generally applied to federal legislation favorable to Indian tribes. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld a federal statute granting an employment preference to Indians in the BIA. The court noted that "an entire title of the United States Code (25 U.S.C.)" would fall if federal legislation favoring "tribal Indians living on or near reservations" was deemed unconstitutional

discrimination. Ibid. at p.552. "Indian preference" was justified by congress' powers under the commerce clause and its relationship to tribes (quasi-sovereign political entities) as guardian-ward.

The Court has employed the Mancari doctrine on several subsequent occasions. For instance, in Fisher v. District Court, 424 U.S. 382 (1976) (per curiam), the Court upheld an Indian's denial of access to a state court forum to decide an adoption issue over which a tribal court had exclusive jurisdiction. The Court held "such disparate treatment of the Indians is justified because it is intended to benefit the class of which he is a member by furthering the policy of Indian self-government" (emphasis added).

The rationale of Mancari, however, is inapplicable where the application of criminal jurisdiction differentiates between nonmember Indians and non-Indians. The distinction burdens nonmember Indians and results in disparate treatment based solely on race. Where the only relevant distinction between nonmember Indians and non-Indians is one of race, strict scrutiny should apply. See Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). In Martinez, strict scrutiny was applied to strike down a tribal ordinance that disallowed the offspring of a mixed marriage in which the woman was a Santa Clara Pueblo, whereas the mixed offspring of a male member suffered no such disability. Since the Duro decision also creates a distinction based on race, strict scrutiny should apply. Moreover, the grant of criminal jurisdiction over nonmember Indians, but not to non-Indians, must be violative of the equal protection provisions of the Indian Civil Rights Act of 1968, Title 25 U.S.C. Sec. 1302(8) (1982 and Supp. IV 1986).

IV. By Creating or Legislating the Significant "Contacts" Test, the Duro Decision has Clearly Departed from the Accepted and Usual Course of Judicial Pronouncements Regarding the Basis for Criminal Jurisdiction and Inappropriately Infringed Upon the Domain of Congress, Thereby Calling for the Supervisory Powers of the United States Supreme Court.

A divided panel of the Ninth Circuit has concluded that jurisdiction by Indian tribes over nonmembers must be determined on a case-by-case basis, and that the exercise of jurisdiction would turn on case by case basis upon the existence of significant "contacts" with the reservation. Duro v. Reina, 851 F.2d 1136, 1144 (9th Cir. 1988).

The supposed "contacts" by Mr. Duro included: (1) a temporary stay of four months on the Salt River Pima-Maricopa Indian Reservation, which the two-judge majority of the panel erroneously referred to as "residence"; (2) the relationship between Mr. Duro and his girlfriend, Debbie Lackey, who is a tribal member, but who is not a resident of the reservation; and (3) his temporary employment with PiCopa Construction Co., which is owned by the Salt River Tribe.

The significant "contacts" test on its face is not workable. It will require a separate investigation of the accused's background, social relations, employment, etc., in every case. More importantly the "contacts" between the accused and the reservation is irrelevant if he or she is not an Indian, but on the other hand, if the accused is a nonmember Indian, significant "contacts" will subject him or her to tribal court jurisdiction. Finally, under the Duro, case-by-case "contacts" test, a nonmember Indian is without notice that they are subject to the jurisdiction of another Tribe until after jurisdiction has been asserted and the significant "contacts" established. Moreover, if the "contacts" are not significant, jurisdiction apparently lies elsewhere.

Second, under the holding of Duro, nonmember Indians would face great difficulty discerning the point at which their contacts become sufficiently significant to subject them to tribal jurisdiction. The absence of substantial ties between the defendant and the tribe would, according to Duro,

bar the exercise of tribal authority. Thus, jurisdiction over a nonmember Indian merely passing through the reservation would evidently lie elsewhere. But that same individual, opting to remain on the reservation even temporarily, is informed by the Duro court that an as yet undetermined amount of contact with the tribe will invoke the jurisdiction of the tribe's criminal justice system. Criminal liability, particularly when coupled with the loss of constitutional rights, should not hinge on such a vague and uncertain distinction.

* * *

But in the criminal law arena, where conviction can result in the deprivation of liberty, the law should require a more compelling justification and a more predictable jurisdictional test.

MacKay, supra, at 405-406 (1988).

Since the efforts of the Duro decision to resolve jurisdictional conflict is impractical and unworkable, it highlights the need for a comprehensive solution to the problems of criminal jurisdiction on Indian lands. However, as recognized in Oliphant, it is Congress, rather than the courts, that must address these jurisdictional problems.

Perhaps, as the Duro court contended, Wheeler and Colville do not unequivocally extend the literal holding of Oliphant to the nonmember Indian situation. The precise issue raised in Duro was admittedly absent in these earlier decisions. This fact, however, does not diminish the importance of the Supreme Court's persistent view that sovereignty is a limited source of tribal power over criminal prosecutions. At a minimum, Wheeler and Colville strengthen the proposition that "tribal governments have the broadest of sovereign powers over their own members." More likely than not, however, these cases, when fairly read in conjunction with Oliphant, establish the court's position that in the area of criminal jurisdiction, the concept of retained sovereignty will not extend tribal control beyond the logical boundary of tribal enrollment. Such an important step must be taken, if at all, by the appropriate authority: Congress.

MacKay, supra, at 395-96 (1988). The two-judge majority in Duro undoubtedly believe that extending the criminal jurisdiction of tribal courts furthers the "policy" and "legitimate goal of improving law enforcement on reservations." 851 F.2d 1136, 1145 (9th Cir. 1988). But similar arguments were rejected by the Supreme Court in Oliphant. 435 U.S. 191, 210-212 (1978). The extension of tribal court jurisdiction requires the affirmative

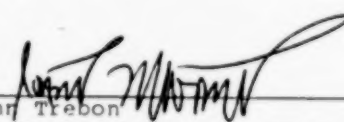
action of Congress, not judicial policy-making by a two judges panel of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Albert Duro requests that the Supreme Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

Dated: January 31, 1989


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APPENDIX

is whether Haberkorn has a legitimate expectation of privacy in the storage unit.

Neither ownership nor presence are required to assert a reasonable expectation of privacy under the Fourth Amendment. A "formalized arrangement among defendants indicating joint control and supervision of the place is sufficient to support a legitimate expectation of privacy." *United States v. Broadhurst*, 805 F.2d 849, 851-52 (9th Cir.1986). If the record "amply indicates a formalized, ongoing arrangement" between the defendants for the storage of chemicals in the storage unit, *id.* at 852, Haberkorn had a reasonable expectation of privacy in the unit. In several cases this court has found that participation in an arrangement that indicates joint control and supervision of the place searched is enough to establish a Fourth Amendment protected privacy interest. See *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984), *cert. dismissed*, 475 U.S. 791, 106 S.Ct. 1623, 89 L.Ed.2d 803 (1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984); *United States v. Johns*, 707 F.2d 1093 (9th Cir.1983), *rev'd on other grounds*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

In the instant case, the indictments charged the defendants with criminal conspiracy as to all the substantive crimes involving the manufacture and possession of the drugs. An affidavit submitted by Haberkorn alleged that he was the co-owner of the chemicals found in the storage unit and the payor of a portion of the rental payments made with respect to the unit. We have before us no other relevant documents.

We are unable to determine on what grounds the district court decided that Haberkorn had no standing. The government in its brief, however, states that for the "purposes of appeal" it does not contest Haberkorn's standing to contest the search. Brief of Appellee United States at 12. Although the indictments and Haberkorn's affidavit do not rise to the level of "stipulated facts," as in *Pollock*, *supra*, these documents do indicate that Johns and Haberkorn were engaged in a joint venture

of some sort at the location of the surreptitious search. Therefore we conclude that Haberkorn has standing to assert his right to any hearing on the admission of evidence relating to the search of the Unit 89 storage space.

REVERSED and REMANDED.

NOONAN, Circuit Judge, concurring in part and dissenting in part:

I concur except as to the last paragraph. I would remand to the district court to determine whether Haberkorn has standing under the standards we are enunciating.



Albert DURO, Petitioner-Appellee,
v.
Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1986.

Decided July 9, 1987.

As Amended June 29, 1988.

Nonmember Indian sought writ of habeas corpus and writ of prohibition challenging trial court's assertion of criminal jurisdiction over crime against nonmember Indian on reservation. The United States District Court for the District of Arizona, William P. Copple, J., granted relief. Appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that tribal court had jurisdiction over nonmember Indian who killed nonmember Indian on reservation.

Vacated and remanded.

Sneed, Circuit Judge dissented and filed opinion.

Opinion superseded, 821 F.2d 1358.

1. Habeas Corpus ¶113(12)

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. Federal Courts ¶8(3)

District court's decision to issue writ of prohibition is reviewed for abuse of discretion.

3. Habeas Corpus ¶45(3)

Habeas corpus statute gave district court jurisdiction over Indian's petition to challenge criminal jurisdiction of tribal court, and, thus, court could issue auxiliary writs in aid of its jurisdiction in its sound judgment. 28 U.S.C.A. § 2241(c)(1, 3).

4. Indians ¶32(13)

Tribal court had criminal jurisdiction over nonmember Indian who allegedly killed nonmember Indian on reservation and had criminal jurisdiction over crimes committed by Indians against Indians without regard to tribal membership. 18 U.S.C.A. §§ 1111, 1151 et seq., 1152, 1153; Klamath Termination Act, § 1 et seq., 25 U.S.C.A. § 564 et seq.

5. Indians ¶36

Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under statute governing applicability to Indian country of criminal laws applicable in areas of exclusive federal jurisdiction. 18 U.S.C.A. § 1152.

6. Constitutional Law ¶82(2), 210(1)

Indians ¶32(4)

Neither bill of rights nor Fourteenth Amendment limits authority of Indian tribes. U.S.C.A. Const.Amend. 14.

7. Indians ¶32(5)

Equal protection provision of Indian Civil Rights Act extends to any person, even non-Indian, within jurisdiction of tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

8. Indians ¶32(5)

Equal protection standard of Indian Civil Rights Act is no more vigorous than Fifth Amendment counterpart. U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

9. Indians ¶1

Members of terminated tribes do not qualify as Indians regardless of their race. 18 U.S.C.A. §§ 1152, 1153.

10. Indians ¶1

Enrolled members of tribes qualify as Indians if there is some evidence of affiliation, such as residence on reservation and association with other enrolled members. 18 U.S.C.A. §§ 1152, 1153.

11. Indians ¶1

Person of mixed blood who is enrolled in recognized tribe or otherwise affiliated with it may be treated as Indian. 18 U.S.C.A. §§ 1152, 1153.

12. Indians ¶32(13)

Tribal courts may define criminal jurisdiction according to complex notion of who is Indian according to totality of circumstances, including genealogy, group identification, and life-style. 18 U.S.C.A. §§ 1152, 1153.

13. Indians ¶32(13)

Nonmember Indian's contacts justified tribal court's conclusion that nonmember Indian was Indian subject to its criminal jurisdiction; Indian was enrolled in recognized tribe, was closely associated with court's tribe through his girl friend, a tribal member, his residence with her family on reservation, and his employment with company owned by tribe.

14. Constitutional Law ¶223

Indians ¶32(13)

Extending tribal court criminal jurisdiction to nonmember Indians with significant contact with reservation does not amount to racial classification for purposes of equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const. Amends. 5, 14.

15. Constitutional Law ¶223

Indians ¶32(13)

Extending tribal court criminal jurisdiction to nonmember Indian was reasonably related to legitimate goal of improving law enforcement on reservation and did not violate equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const. Amends. 5, 14.

16. Indians ¶38(2)

Federal court would have no criminal jurisdiction over nonmember Indian who shot nonmember Indian on reservation, if courts treat defendant and victim as non-Indians. 18 U.S.C.A. §§ 13, 1152, 1153.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was

born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and moved him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River

Department of Public Safety. On October 19, the trial court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from the judgment.

II

STANDARD OF REVIEW

[1-3] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 474 U.S. 841, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice be-

tween recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them.¹ The Court's opinion explicitly re-

1. In a recent decision, *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988), the Eighth Circuit concluded that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe.

The Eighth Circuit acknowledged that the Supreme Court in *Oliphant* held that the Suquamish Tribal Court lacked authority to exercise

criminal jurisdiction over non-Indians and that Congress had not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians. *Greywater* acknowledges that 18 U.S.C. § 1152 may seem to indicate that Congress' use of the term "Indian" was meant to include all Indians regardless of tribal affiliation and while acknowledging the sovereign

fers only to non-Indians. The Court never used the term "nonmember." However, the Supreme Court in one subsequent dissent and one subsequent opinion describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-3, 102 S.Ct. 894, 919-20, 71 L.Ed.2d 21, 50-52 (1982) (Stevens, J. dissenting). This case only concerned the Indian tribe's authority to impose a mining severance tax on non-Indians who were mining on the reservation. The majority opinion on occasion, and for no apparent reason, uses the term "nonmember" when discussing the power of the tribe to tax "non-Indians." *Id.*, 102 S.Ct. at 903-5. This change in terms has no relevance to the decision. It is clear that the Court is discussing the tribe's authority to tax "non-Indian" miners not "nonmembers."

Justice Stevens' dissent in addressing the authority of the tribe to tax the non-Indian lessees who produce oil and gas from within the tribe's reservation in dicta miscasts *Oliphant* as holding that tribes "have no criminal jurisdiction over crimes committed by nonmembers within the reservation." *Id.* at 919. In his analysis of the power of the tribe to tax, Justice Stevens interchanges the terms "nonmember" and "non-Indian." The majority rejected his analysis that the power of an Indian tribe to exclude nonmembers was the basis for imposing a

power of tribes to punish offenses against tribal law by members of a tribe found that federal preemption of a tribe's jurisdiction to punish its members for infraction of tribal law would detract substantially from tribal self-government. However, the Eighth Circuit ultimately found that the Devils Lake Sioux Tribe's exercise of criminal jurisdiction over nonmember Indians is beyond what is necessary to protect the rights essential to the tribe's self-government and is inconsistent with the overriding interest of the federal government in ensuring that its citizens are protected from unwarranted intrusions upon their personal liberty. For the reasons expressed in this amended opinion, we do not find the Eighth Circuit's reasoning persuasive.

2. A review of several of the authorities cited in the *Oliphant* opinion fortifies the point that its application is limited to the lack of tribal court criminal jurisdiction over non-Indians not nonmember Indians. E.g. *Ex Parte Kenyon*, 14

tax on the nonmembers, *Id.* at 903, 519, 920.

In *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978), Justice Stewart in dictum stated that *Oliphant* stands for the proposition that nonmembers cannot be tried in tribal courts. The term "nonmember" was used throughout the *Wheeler* opinion, however, nonmember status was not in issue as *Wheeler* was a member of the Navajo tribe, who was tried by the Navajo tribal court for a Navajo tribal code violation. At issue was not the jurisdiction of tribal courts but the possible double jeopardy effect of a prior tribal court conviction in a federal rape prosecution. The indiscriminate use of the term "nonmember" throughout the *Wheeler* opinion, 435 U.S. at 322-28, 98 S.Ct. at 1085-89, amplifies the point that Justice Stewart's statement is merely dictum. To the contrary two other Supreme Court opinions describe *Oliphant*'s holding as limited to non-Indians. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985) (tribal court power to exercise civil subject matter jurisdiction over non-Indians); *Washington v. Confederated Tribes*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).

It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.³ The holdings of the cases

F.Cas. 353 (W.D.Ark.1878) ("petitioner was born of white parents, had left his domicile in the Indian county and gained domicile in the state of Kansas."); 2 Op.Atty.Gen. 693 (1834) (Attorney General concludes that the Choctaw tribal courts have no jurisdiction over white citizens nor over Negro slaves owned by white citizens.); *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113 (1970) (Solicitor General of the Department of Interior concludes that Indian tribes do not possess criminal jurisdiction over non-Indians).

3. A similar inconsistency pervades the opinions of this court. Compare, e.g. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g. *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal of-

cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

fenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. See *Robbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

4. See Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

The comment only postulates that nonmember Indians and non-Indians be treated the

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. There are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). One commentator has implied that non-Indians and nonmembers have the same status. The implication was derived from an analysis of statutes that allow states to assume criminal and civil jurisdiction over Indian country with the consent of the tribe occupying the particular Indian country. 25 U.S.C. §§ 1321, 1322 and 1326. We do not agree with that implication.⁴

same. The comment acknowledges that changes in Indian treaty provisions in the 18th and early 19th centuries make Congress' intent uncertain on the issue of federal versus tribal criminal jurisdiction. These language changes might indicate, the comment suggests:

"[T]hat Congress meant to assume federal jurisdiction over offenses between nonmember Indians and tribal members in the same manner it had previously assumed federal jurisdiction over offenses between non-Indians and tribal members. On the other hand Congress may have intended the change of language to merely reflect the applicability of a treaty to only the signatory tribes." *Id.* at 738 (emphasis added).

At the same time the comment proposes that by examining treaty provisions, the intent of Congress to assume jurisdiction over nonmember Indians is made clear. Yet later the author, examining federal statutes (25 U.S.C. §§ 1321, 1322 and 1326) states that Indian and nonmember Indians can only be implicitly equated.

The problem is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area. Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations.

As for *Oliphant*, the comment acknowledged several times that it is limited to non-Indians.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.⁵ *Id.* at 206, 208, 98 S.Ct. at 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over nonmember Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim which we address later. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

Rather, what is more dispositive of this case is the federal criminal statutory scheme⁶ and its treatment of crimes committed by Indians. 18 U.S.C. § 1151, et seq.

[4] That statutory scheme subjects individuals to federal prosecution "by virtue of their status as Indians." *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977). For purposes of the federal criminal statutes the impor-

5. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

6. In addition to the statutory scheme, the regulatory scheme promulgated by the Department of Interior's Bureau of Indian Affairs establishing Courts of Indian Offenses states that those courts "shall have jurisdiction over all offenses ... when committed by any Indian, within the

tribe inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in *United States v. Heath*, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. §§ 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation. The reason was the absence of a federal relationship between the Klamaths and the United States as a result of the termination of federal supervision over the Klamath Tribe by the Klamath Termination Act, 25 U.S.C. § 564 et seq. *Id.* at 19. Under 18 U.S.C. § 1153 jurisdiction is based upon a crime committed by one Indian against another Indian within the Indian country. It was not suggested that federal jurisdiction was lacking because the Klamath was on the reservation of the Warm Springs Tribe, where she enjoyed no tribal relationship.

Granted, the discussion so far has been concerned with federal jurisdiction and not tribal. However, it cannot be ignored that the two are interwoven. Thus in *Arizona ex rel Merrill v. Turtle*, *supra*, we held that Navajo tribal sovereignty precluded Arizona from arresting a Cheyenne Indian on the Navajo Reservation for the purpose of extraditing him to Oklahoma. We recognized, by analyzing the terms of the Treaty of 1868 between the Navajos and the United States that a tribe has the right to exercise power over the Indian residents of its reservation, without distinction as to

reservation or reservations for which the court is established ... 25 C.F.R. § 11.2(a) (1987) (emphasis added). We find it instructive that the regulations fail to limit jurisdiction of these courts only to offenses committed by Indians of the tribe for which the particular court is established. (The regulations deem an Indian, for purposes of these courts "to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 25 C.F.R. § 11.2(c) (1987). There is no distinction made as to the status of nonmember Indians.)

whether the Indian was a member of the tribe or not. *Id.* at 686.

The structure of criminal jurisdiction in Indian country, as far as it relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to that or some other tribe ... [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886) (emphasis added). The statute has never been restricted in its application to Indians who are members of the "host" tribe.

[5] Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under 18 U.S.C. § 1152. That statute makes applicable in Indian country those criminal laws applicable in areas of exclusive federal jurisdiction with several exceptions.⁷

As 18 U.S.C. § 1152 has been applied it has also been assumed that references to "Indian" meant any Indian not just Indians who were members of the host tribe. In *United States v. Burland*, 441 F.2d 1199 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971) we applied the statute to a member of the Confederated Salish and Kootenai Tribes who committed a crime on the Flathead Reservation. We noted, citing *Kagama*, *supra*, that Bur-

7. The statute does not apply to offenses committed by one Indian against the person or property of another Indian, nor to an Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

8. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment

land did not argue "that the statute was inapplicable to him because he was a member of a tribe other than the local tribe and was visiting from another reservation." *Id.* at 1200, n. 1.

Furthermore, in discussing the Major Crimes Act, we held in *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980) that except for the crimes specifically enumerated in the Act, "the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country." *Id.* at 1231. Again we declined to make a distinction between member and nonmember Indians.

The cases discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.

B. Equal Protection

[6,7] The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.⁸ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict

limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv.L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

[8] The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."⁹ *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federal recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*, 417 U.S. 535, 553, n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

[9-12] The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509

F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pera*, 99 F.2d 28, 31 (7th Cir.1938), cert. denied, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[13] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that his is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

Pueblo v. Martinez, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

9. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra* note 8. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara*

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order to better enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs*, 98 Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently

from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959).

[14, 15] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

[16] Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.¹⁰ See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. 14

10. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already

been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, Dissenting:

The majority has substantially revised its opinion since it first appeared at 821 F.2d 1358-64 (9th Cir.1987). It is, therefore, appropriate that my dissent be revised, particularly in light of the fact that the intervening deliberations have provided to me additional insights that have strengthened my resolve to dissent.

In my original dissent, I stated "*Oliphant* should govern this case." *Id.* at 1364. That remains true, but now I am more ready to concede that it need not. The underpinning of its holding was the history of the relationship between the United States and Indian tribes generally and the Suquamish Tribe in particular.

Emphasis was placed upon the fact that the tribes seldom, if ever, exercised criminal jurisdiction over non-Indians prior to the middle of this century. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196, 97, 98 S.Ct. 1011, 1014-15, 55 L.Ed.2d 209, (1978). The same undoubtedly cannot be said with respect to the exercise of criminal jurisdiction over Indians not members of the adjudicating tribe. Therefore, I concede that the *ratio decidendi* of *Oliphant* is not applicable to this case.

Nonetheless, *Oliphant* exists. Its holding that neither the existing residual tribal sovereignty nor a grant of power by Congress authorized the exercise of criminal jurisdiction by a tribe over a non-Indian leaves open the question whether either supports the exercise of such jurisdiction over a nonmember Indian. I believe neither does. My reasons, succinctly stated, are as follows:

(1) *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), makes clear that retained tribal sovereignty exists to govern the behavior of tribal members. No necessity exists to expand its reach.

(2) No federal statute explicitly grants to tribal authorities the power to exercise criminal jurisdiction over nonmembers. 18 U.S.C. § 1152 does not exclude such a grant but it does not require it. Nor does existing case law require it.

(3) To subject nonmember Indians to tribal jurisdiction discriminates against the nonmember both actually and potentially. This discrimination is not justifiable.

I now shall address each of these positions in greater depth.

I.

RETAINED TRIBAL SOVEREIGNTY

To understand the scope of *United States v. Wheeler*, *supra*, it is helpful to point out that both *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Wheeler* originated in this circuit and that each constituted a reversal of this circuit's prior decision. In *Oliphant*, this circuit extended

criminal tribal jurisdiction to non-Indians, while in *Wheeler* it made any conviction by a tribal court of any crime over which it had jurisdiction a bar to prosecution by the United States of the greater offense of which the tribally prosecuted lesser included offense was a part. The circuit court in *Wheeler* undoubtedly was influenced by the expansion of tribal authority recognized by *Oliphant*. To reach its result in *Wheeler*, this court reasoned that the United States and the Navajo Tribe should not be treated as dual sovereigns for double jeopardy purposes.

It was this proposition against which much of the Supreme Court's opinion in *Wheeler* is directed. It must be remembered that the Court no doubt considered *Wheeler* and *Oliphant* contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided *Oliphant* by rejecting the expansion of the authority of tribal courts over crimes by non-Indians, it would not have been surprising to have found the Court in *Wheeler* using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in *Wheeler*. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its members. Two examples of this focus are as follows:

Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that

part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 [94 S.Ct. 772, 777-778]; *Johnson v. McIntosh*, 8 Wheat. 543, 574 [5 L.Ed. 681]. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559 [8 L.Ed. 483]; *Cherokee Nation v. Georgia*, 5 Pet., at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 [8 L.Ed. 162] (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant v. Suquamish Indian Tribe*, ante, [435 U.S.] p. 191 [98 S.Ct. p. 1011].

435 U.S. at 326, 98 S.Ct. at 1087 (emphasis added).

In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. at 1088 (emphasis added) (footnotes omitted). Others appear in the margin.¹

1. It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people with the power of regulating their internal and social relations." *United States v. Kagama*, *supra*, 118 U.S. at 381-382, 6 S.Ct. at 1112-1113; *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 80 L.Ed. 25. Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions. *United States v. Antelope*, 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395,

1397 n. 2; *Talton v. Mayes*, 163 U.S. 376, 380, 16 S.Ct. 986, 988, 41 L.Ed. 196; *Ex parte Crow Dog*, 109 U.S. 556, 571-572, 3 S.Ct. 396, 405-406, 27 L.Ed. 1030 (1883); see 18 U.S.C. § 1152 (1976 ed.), *infra*, n. 21.

435 U.S. at 322, 98 S.Ct. at 1085 (emphasis added) (footnote omitted).

The Indian tribes are "distinct political communities" with their own mores and laws. *Worcester v. Georgia*, 6 Pet., at 557; *The Kansas Indians*, 3 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means.

The lesson to be drawn appears to me to be clear. Retained tribal sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate. The upshot is that the majority wishes to enhance slightly tribal powers while I do not.

II.

DO FEDERAL STATUTES GRANT TO TRIBES POWER TO IMPOSE CRIMINAL PUNISHMENT ON NONMEMBER INDIANS?

The majority devotes substantial space to arguing that federal statutes have given tribal courts the power to subject nonmember Indians to its criminal jurisdiction. See pp. 12-16 [Brunetti draft]. It asserts that certain cases have assumed that such jurisdiction exists and that "the structure of criminal jurisdiction in Indian country," p. 14[B.d.], also suggests that this is true.

I shall address each case cited by the majority. Only a portion of a sentence appearing in *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977), was quoted by the ma-

They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U.S. at 571 [3 S.Ct. at 405].

Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. *Id.* at 331-32, 98 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

majority, apparently to make the point that federal criminal statutes focus on "Indians" without the qualifier "tribal member" or "non-tribal member." The full sentence is:

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

The "circumstances of this case" were that members of the Coeur d'Alene tribe murdered a non-Indian in the Coeur d'Alene reservation and sought to be tried under Idaho law rather than federal law pursuant to the Major Crimes Act, 18 U.S.C. § 1153. The Court rejected the defendants' constitutional argument. It was not necessary to address whether any distinction between members of the Coeur d'Alene tribe and nonmembers existed. To have said each time the word "Indians" was used, "including both members and nonmembers," would have been absurd. The case simply is not relevant to the issue before us.

The majority itself recognized the marginal significance of *United States v. Heath*, 509 F.2d 16 (9th Cir.1974), to the issue before us. I would go further and assert that it has no relevance whatsoever. The issues before the court in *Heath* were whether the United States could indict an Indian of a terminated tribe under the Major Crimes Act, 18 U.S.C. § 1153, and, if

2. 18 U.S.C. § 1153 reads in relevant part as follows:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

not, whether the attempt to do so was prejudicial error when the crime charged was murder, as defined in 18 U.S.C. § 1111, and committed in "Indian country" and, thus, subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. § 1152.¹ This court held that the defendant, as an Indian of a terminated tribe, must be treated as any other non-Indian citizen of the state. As a result, 18 U.S.C. § 1153 could not provide a basis for federal jurisdiction. It applies, this court held, only when the "Indian who commits [certain crimes] against the person or property of another Indian or other person," § 1153, is an Indian as to whom the United States has a "special responsibility." *Heath*, 509 F.2d at 19. A person, who happens to be an Indian and was once a member of a now terminated tribe, could have been indicted, as could have been any other person, under 18 U.S.C. § 1152. The court concluded that under these circumstances the indictment under 18 U.S.C. § 1153 was not prejudicial error.

The issue of tribal court jurisdiction over a nonmember Indian was irrelevant to the question that *Heath* raised. Had the *Heath* court believed that the tribal court had criminal jurisdiction over a nonmember it would have affected neither its reasoning nor its result. The crucial issue, as seen by *Heath*, was whether the United States had a "special responsibility" with regard to the defendant, not whether the defendant was a member of the victim's tribe. The majority says it did not occur to the *Heath* court to suggest "that federal jurisdiction is lacking because the Klamath [the defendant Indian] was on the reservation of the Warm Springs Tribe, where he enjoyed no tribal relationship." [B draft p. 3] Of course, it did not. It was irrelevant. To overlook an issue that could have been controlling is significant; to refrain from addressing one that is irrelevant only mer-

3. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person

cifully saves both the reader's eyes and time.

The majority's use of *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970), is a bit closer to the mark at which it is shooting. Unfortunately, a miss is a miss, however. This court, in holding that the Navajo Tribe need not accede to Arizona's effort to extradite a Cheyenne Indian resident on their reservation to the State of Oklahoma, emphasized the retained sovereignty of the Tribe. We pointed to the Treaty of 1868, the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the codification of the Navajo Tribe's extradition responsibilities in its Tribal Code, and the approval of that Code by the Commissioner of Indian Affairs. None of those sources of law required the Tribe to accede to Arizona's request. Indeed, the Tribal Code expressly precluded any such accession.

The case, therefore, is consistent with the existence of substantial retained sovereignty and for the purposes of the case treated members and nonmembers the same. This similarity of treatment was rooted in the 1868 Treaty that spoke of "bad men among the Indians," who committed wrongs against anyone "subject to the authority of the United States," a group that undoubtedly includes, from time to time, whites as well as nonmember Indians. But it goes no further. It simply does not address the jurisdiction of the Navajo Tribe to subject nonmembers to criminal prosecution. If one repeats "tribal sovereignty" over and over again, the hypnotic power of the phrase may lead one to conclude that such jurisdiction in a given situation exists. Reasoning, not self-hypnosis, is the way of the law, however.

or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.
11 U.S.C. § 1152.

Enough has been said to suggest that neither 18 U.S.C. § 1152 nor 18 U.S.C. § 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

The Federal Enclaves Act, 18 U.S.C. § 1152, also does not unequivocally support the majority. Its principal purpose is to extend to "Indian country" the general laws of the United States. The reach of those laws within "Indian country" clearly is unaffected by whether the offender is an Indian or a non-Indian. See *Mull v. United States*, 402 F.2d 571, 573 (9th Cir.1968), cert. denied, 393 U.S. 1107, 89 S.Ct. 917, 21 L.Ed.2d 804 (1969). On its face, 18 U.S.C. § 1152 also would appear not to draw a distinction between a victim who is Indian and one who is not. However, it has been long established that the statute does not embrace an offense by a non-Indian against a non-Indian even when committed in Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 869, 26 L.Ed. 869 (1882); see *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Mull v. United States*, 402 F.2d at 573.

An offense by an Indian against a non-Indian, on the other hand, is within the statute. See *United States v. Burland*, 441 F.2d 1199, 1203 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971). And it is true, as *Burland* holds, that the Indian offender need not have committed his crime within the reservation limits of the tribe of which he is a member. Cf. *United States v. Kapama*, 118 U.S. 375, 382, 6 S.Ct. 1109, 1113, 30 L.Ed. 228, 231 (1885). All that is necessary is that it have been committed in "Indian country."

4. And possibly on state prosecutors if, as has been suggested by some, "victimless" crimes by non-Indians (and nonmember Indians by the

The position of the majority emerges in its most forceful form when the focus is fixed upon the exceptions to 18 U.S.C. § 1152. These are (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," and (3) any offense where by treaty exclusive jurisdiction "is or may be secured to the Indian tribes respectively." Only the first would be affected by taking *Wheeler* at its word and rejecting the position of the majority. In essence, the majority argues that because there is no explicit provision for relieving the nonmember Indian from tribal jurisdiction in the first exception, he must be subject to the tribe's criminal jurisdiction. It buttresses this by pointing out, as already indicated, that 18 U.S.C. § 1152 is applicable generally without regard to whether the offender was a member of the Tribe on whose reservation the offense was committed. Thus, tribal membership, it argues, also should be irrelevant in applying the exception.

The conclusion does not follow. To disregard membership in construing the broad reach of 18 U.S.C. § 1152 protects Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to enhance the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist. Finally, there is no more reason to treat the literal language of the statute as all encompassing than there was in the case of the non-Indian offense against the non-Indian. See *McBratney*, 104 U.S. 869; *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307.

I acknowledge that the exclusion of nonmember Indians from the jurisdiction of tribal court will impose somewhat greater responsibilities on certain United States Attorneys.⁴ Nonmember offenses not directed at another Indian, and not described in the Major Crimes Act, 11 U.S.C. § 1153, must be prosecuted by these officials.

reasoning of the dissent) fall within the exclusive jurisdiction of state courts. See 3 Op. Off. Legal Counsel 111 (1979).

This category embraces such things as drunk and disorderly conduct.

The majority also suggests that state prosecutors and state courts may become involved in law enforcement. This concern appears to be premised on the assumption that an offense by a nonmember Indian against another Indian, which is not a major crime, would not be covered by 18 U.S.C. § 1152 were my view to prevail. Thus, the majority suggests state law enforcement would be required to fill the gap.

I suggest the majority has misread 18 U.S.C. § 1152. To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently. To the extent the offense each commits is not proscribed by federal law, the Assimilative Crimes Act, 18 U.S.C. § 13, will import the applicable state law to be applied by federal authorities and courts.

The fear of the majority can be put this way. As they see it, an offense which is not a major one by an Indian against an Indian is excluded from federal jurisdiction when tribal jurisdiction is lacking because the offender is a nonmember. I suggest that under those circumstances the offense "escapes" the first exception to the general rule of 18 U.S.C. § 1152 but does not "escape" the broad reach of 18 U.S.C. § 1152. That is, the offense remains an offense by an Indian within Indian country and thus subject to the general laws of the United States, but, for the reason stated here, should not be considered as one committed by one Indian against another within the meaning of the first exception to 18 U.S.C. § 1152. Put more simply, the nonmember Indian should be treated as a non-Indian.

III.

DISCRIMINATION AGAINST THE NONMEMBER INDIAN

In my original dissent, I lumped all the discriminatory possibilities to which the

majority subjected the nonmember Indian under the heading of equal protection. The majority in its original and revised opinion addresses the equal protection issue and concludes that there is a rational basis for subjecting the nonmember to tribal jurisdiction and that, in any event, in this case Duro is not being discriminated against on the basis of race.

On reflection, I have concluded that it is not essential to my position to fit the facts of this case to the analytics of the equal protection doctrines. Rather, I have employed the discriminatory possibilities this case suggests to inform my interpretation of the applicable statutes and cases. These possibilities may, but need not, rise to the level of equal protection violations. Their existence suggests, however, that wise construction of the applicable law should reduce, if not eliminate, their existence.

The heart of the issue this case presents, as this dissent already has stated, is that the majority puts the offending nonmember Indian in a position different from, and less advantageous than, that of any other class of offender. The member Indian offender is "among his own," which presumably is frequently to his benefit. The non-Indian is protected by *Oliphant*, *supra*, from possibly harsh treatment by a tribal court animated by a bias against all non-Indians. And the Indian no longer enjoying the "special relationship" with the federal government enjoys the same protection as does the non-Indian. Only the nonmember Indian still enjoying that "special relationship" must be subject to a tribunal that, on its face, suggests the possibility of prejudice against him.

It is not beyond the pale of proper judicial behavior to employ an interpretation of the law that eliminates this possibility. In the final analysis, the majority has suggested only two rather weak reasons for not doing so, viz., to enhance tribal sovereignty and to avoid burdening U.S. Attorneys and their staffs. Inasmuch as the contribution to these ends made by the majority's approach is only marginal at

best, I would hold that the price demanded for these modest achievements is too high. Tribes would lose no meaningful sovereignty under my analysis nor would U.S. Attorneys become overburdened.

I respectfully dissent.



NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellant,

v.

Donald P. HODEL, Secretary of the Interior, et al., Defendants-Appellees,

Western Energy Co.; Wesco Resources, Inc.; and Thermal Energy, Inc.,
Defendants-Intervenors-Appellees.

No. 86-4389.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 10, 1987.

Decided March 15, 1988.

As Amended July 11, 1988.

Indian tribe sought to enjoin the Secretary of the Interior from proceeding with federal coal leases without complying with federal law. The United States District Court, District of Montana, James F. Battin, Chief District Judge, granted tribe summary judgment and issued injunction voiding leases as being in violation of the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of tribe. The Secretary moved to amend judgment and the District Court amended its injunction to suspend, rather than void, the leases. Tribe appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) the Secretary's motion gave the District Court power to amend the judgment; (2) finding that leases violated federal law did not mandate issuance of

injunction; (3) the District Court abused its discretion by failing to consider public interest before amending injunction; and (4) the District Court abused its discretion by failing to order the Secretary to comply with his own regulations concerning competitive leasing of federal coal rights.

Reversed and remanded with instructions.

Opinion superseded, 842 F.2d 224.

1. Federal Civil Procedure ¶2643

Motion to alter or amend judgment gave district court power to amend judgment which had voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ. Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act, § 2 et seq., 30 U.S.C.A. § 201 et seq.

2. Federal Civil Procedure ¶2658

Ten-day limitation contained in rule concerning motions to alter or amend judgments has to be strictly construed. Fed. Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

3. Federal Civil Procedure ¶2658

Motion for "modification of relief" filed by coal lessee was not motion to alter or amend judgment, and thus, was not subject to ten-day limitation; rather, motion was timely response to lessor's motion to amend judgment, which voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ. Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act § 2 et seq., 30 U.S.C.A. § 201 et seq.

before the trial in this case. Mr. Bennett has attempted to argue that this was done because, after all, we had a new bankruptcy law. Well, as Counsel are aware, the new bankruptcy law became law on July 10th; this motion was filed in September. I can go through the file and find the exact date, but as I recall it was just two or three judicial days before the trial.

* * *

Therefore, the Court must consider that the last-minute filing of these motions was in bad faith. I think that if there's any doubt in that, it was confirmed by the fact that after this Court denied both of those motions, that the Plaintiff filed a Notice of Intent to Appeal; argued before the Court that the notice automatically stayed the trial until the District Court could resolve the matter. And as I recall—I'm probably not in a position to quote, verbatim—but I recall making the remark to Plaintiff's Counsel that if the motion's granted, it's granted; if it's denied, it's granted if you file a Notice of Appeal. The response to that was something to the effect that, That's correct, Your Honor.

* * *

Clearly, the last minute attempt, if nothing else, was done in bad faith in this case; the last-minute attempts to postpone the trial, with no basis for these last-minute attempts, certainly were in bad faith.

(Transcript of Proceedings, October 29, 1984, at 45-47; Bankr. CR 84; emphasis added).

The bankruptcy court did not award the Pughs fees or costs for American's bad faith tactics, however, because it awarded the Pughs fees under ORS 743.114 of the Oregon Insurance Code.⁴

We affirm the judgment of the district court affirming the bankruptcy court's denial of American's request for a jury trial

4. The bankruptcy court held:
"In light of this opinion, we need not discuss nor resolve the issue raised by defend-

and reversing the bankruptcy court's award of fees under ORS 743.114. Because the bankruptcy court did not reach the issue of possible bad faith litigation by American, we remand to the bankruptcy court for a determination of this issue.

AFFIRMED and REMANDED.



Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1985.

Decided July 9, 1987.

Nonmember Indian petitioned for writ of habeas corpus and/or writ of prohibition challenging tribal court's assertion of criminal jurisdiction. The United States District Court for the District of Arizona, William P. Copple, J., granted requested relief, and appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that nonmember Indian was subject to criminal jurisdiction of trial court for murder of another nonmember Indian on reservation, where defendant had significant contacts with reservation.

Vacated.

Sneed, Circuit Judge, dissented and filed opinion.

ants that plaintiff has delayed and increased the costs of this litigation in bad faith."

1. Habeas Corpus ¶113(12)

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. Indians ¶38(2)

Nonmember Indian defendant was subject to criminal jurisdiction of tribal court for murder of another nonmember Indian on reservation, where defendant was enrolled in recognized tribe, lived on reservation with member Indian, and was employed by company owned by tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5.

3. Constitutional Law ¶223

Indians ¶38(2)

Extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation does not amount to racial classification in violation of equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

4. Constitutional Law ¶223

Indians ¶38(2)

Policy of extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation is reasonably related to legitimate goal of improving law enforcement on reservations, and thus did not violate equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I.

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torres-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court

for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and removed him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the tribal court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from that judgment.

II.

STANDARD OF REVIEW

[1] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chalman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, — U.S. —, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 864, 872, 54 L.Ed.2d 876 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236,

239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III.

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian*

Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them. The Court's opinion explicitly refers only to non-Indians. However, some subsequent opinions describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173, 102 S.Ct. 894, 920, 71 L.Ed.2d 21 (1982); *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978). Other opinions describe *Oliphant*'s holding as limited to non-Indians. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.¹ The holdings of the cases cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this ar-

gument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. On the one hand, there are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L. Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). On the other hand, both executive and congressional pronouncements apparently use the word "Indian" to mean "tribal member," implying that non-Indians and nonmembers have the same status. See Comment, *Jurisdiction*

eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe", cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

1. A similar inconsistency pervades the opinions of this court. Compare, e.g., *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g., *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant*

over Nonmember Indians on Reservations, 1980 Ariz.St.L.J. 727, 746-48.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.² *Id.* at 206, 208, 98 S.Ct. 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over non-member Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim to which we next turn. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

2. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99. Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

3. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv. L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

4. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protec-

B. Equal Protection

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.³ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federally recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*,

tion standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra*, note 3. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 1290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), cert. denied, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[2] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that this is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order better to enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S.902 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable. American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of

treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, — U.S. —, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[3, 4] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.⁵ See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indi-*

an Law 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, dissenting:

I respectfully dissent. *Oliphant* should govern this case. Two commentators re-

5. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already

been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

cently have concluded that, for purposes of determining the criminal jurisdiction of tribal courts, *Oliphant* and the history of relevant treaties and statutes suggest that nonmember Indians and non-Indians be treated the same. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1022 n. 251 (1981); see Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 737-49. The Supreme Court made this conclusion explicit in *United States v. Wheeler*, 435 U.S. 313, 322, 324, 326-27, 328, 98 S.Ct. 1079, 1085, 1086, 1087-88, 1088, 55 L.Ed.2d 303 (1978), by its emphasis of tribal sovereignty as the source of the tribe's criminal jurisdiction over its members.

Independently of these authorities, the equal protection clause of the Indian Civil Rights Act requires affirmance of the district court. To embrace the differential treatment of non-Indians and nonmember Indians within the context of this case is to employ a classification based upon race. It is true that special treatment of Indians in many situations has not been treated as being based on race but rather on the unique sovereignty of Indian Tribes. See *United States v. Antelope*, 430 U.S. 641, 645-47, 97 S.Ct. 1395, 1398-99, 51 L.Ed.2d 701 (1977). That sovereignty provides no proper basis for depriving a nonmember Indian of an immunity from tribal jurisdiction enjoyed by a non-Indian. Neither does the fact that the determination of who is an Indian sometimes involves factors other than race.

Laws based on racial classifications are subject to strict scrutiny. Extending tribal court criminal jurisdiction to nonmember Indians might incrementally aid law enforcement on reservations. But then so might its extension to non-Indians. However, clearly these extensions are not necessary to achieve a compelling governmental interest. Therefore it fails the applicable equal protection test.

Different tribes do things differently. Indian law traditionally respects the tribes' individuality. See Clinton, *supra*, at 984-

91. Limiting a tribal court's criminal jurisdiction to members of its own tribe is quite consistent with the self-determination of Indian tribes. To bar its extension to nonmember Indians does not significantly impair tribal self-determination.



UNITED STATES of America,
Plaintiff-Appellant,

v.

Roscoe L. LITTLEFIELD,
Defendant-Appellee.

No. 86-1160.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 1987.

Decided July 10, 1987.

Government sought forfeiture of owner's property on which marijuana allegedly was grown. The United States District Court for the Northern District of California, William H. Orrick, Jr., J., determined that forfeiture was authorized only for those persons of property actually used or intended to be used to grow marijuana, and Government appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) owners alleged use of portion of 40-acre parcel of property to grow marijuana subjected entire parcel to forfeiture, but (2) before entering order of forfeiture, district court was required to determine that forfeiture of entire property together with other punishments imposed was not so disproportionate to offense committed as to violate Eighth Amendment.

Reversed and remanded.

1. Drugs and Narcotics ¶191

By specifying that property is subject to forfeiture if used in "any manner or

F.2d 348 (8th Cir.1984), and *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir.1987), travel time must be compensated at the same hourly rate as other work. In *Cruik*, however, we simply said that the district court's award of fees for travel time at the full rate was not unreasonable on the particular facts there before us. *Cruik*, 738 F.2d at 350-51. And in *Rose* we said that the district court should "award fees at the full hourly rate ... unless it determine[d] in its discretion that such a recovery would be unreasonable." *Rose*, 816 F.2d at 396 (emphasis added). Neither case holds that fees for travel time must always be awarded at the full hourly rate. The District Court concluded that the rate for travel time should be lower in this case and we do not find that decision to run afoul of applicable law or to be unreasonable.

The order of the District Court is AFFIRMED.



Albert DURO, Petitioner-Appellee.

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Nov. 2, 1988.

Appeal from the United States District Court for the District of Arizona.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.
Before CHOY, SNEED and BRUNETTI, Circuit Judges.

ORDER

Judge Choy and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends accepting the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. Fed.R.App.P. 35(b). A majority of the judges voted against en banc consideration. Judge Kozinski's dissent from the order denying rehearing en banc is attached.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom LEAVY and TROTT, Circuit Judges, join, dissenting from the order denying rehearing en banc.

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," *Duro v. Reina*, 851 F.2d 1186, 1189 (9th Cir.1988), a panel of our court has cast off the map and the compass. The panel's holding—that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe—overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals. This is a serious matter deserving serious attention. I therefore respectfully dissent from the order denying rehearing en banc.

I

Petitioner Albert Duro is a member of the Torres-Martinez band of Mission Indians. From March 1984 to June 1984, Duro

lived on the Salt River Indian Reservation, the home of the Salt River Pima-Maricopa Indian Community, a tribe in which Duro is ineligible for membership. While on the Salt River Reservation, Duro allegedly shot and killed a fourteen year old boy. Criminal complaints against Duro were filed in both federal district court and the Salt River Pima-Maricopa Indian Community Court.

The panel holds that the tribal court has criminal jurisdiction over Duro, a member of a wholly different tribe, simply because he is an Indian. As discussed more fully below, this one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided.

II

A. Disregard of Supreme Court Authority

The panel laments the lack of Supreme Court guidance on the question before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its inattention on labelling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has charted a clear course through these waters, a course that the Eighth Circuit had no difficulty

1. The panel correctly notes that *Oliphant* has been widely criticized. 851 F.2d at 1142 n. 5. See Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1987 Wis.L.Rev. 219, 267-74; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479 (1979); Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Shark*, 63 Minn.L.Rev. 609 (1979). Yet *Oliphant* remains law and continues to be, at least in the Supreme Court's view, the progenitor of a series of tribal jurisdiction decisions. The panel may well be right in joining the chorus. 851 F.2d at 1141-42, but academic criticism, no matter how strong, cannot overrule a decision of the Supreme Court.

following. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988).

The course starts with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the Court held that tribes could not exercise criminal jurisdiction over non-Indians.¹ Standing alone, *Oliphant* leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians who are not members of the forum tribe. A series of subsequent decisions have elaborated on *Oliphant*, however, effectively foreclosing this possibility.

Only two weeks after *Oliphant* the Court decided *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 302 (1978). *Wheeler* raised the question whether the defendant (a member of the Navajo tribe) could be tried in federal court after the Navajo tribal court had convicted him for the same conduct. To resolve this question, the Supreme Court had to examine the source of the tribe's authority over *Wheeler*.² The Court concluded that the jurisdiction derived from the tribe's retained authority, i.e., that aspect of the tribe's sovereignty it had not given up by virtue of incorporation into the United States. In reaching this conclusion, the Court drew a sharp distinction between those sovereign powers the tribe had surrendered and those it had not.

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the rela-

2. The source of the authority was crucial for double jeopardy purposes: If the tribe derived its authority from Congress, the defendant would face double jeopardy because both prosecutions would be on behalf of the same sovereign. See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937) (double jeopardy clause bars successive prosecutions by federal and territorial courts because they are "creations emanating from the same sovereignty"); *Waller v. Florida*, 397 U.S. 387, 393, 90 S.Ct. 1184, 1187, 25 L.Ed.2d 435 (1970) (barring successive prosecutions by a city and by the state of which the city is a political subdivision). If the sources were different (as in the case of separate state and federal prosecutions), then the double jeopardy clause would not bar subsequent prosecution by the United States. See *Wheeler*, 435 U.S. at 329-30, 98 S.Ct. at 1089-90.

tions between an Indian tribe and non-members of the tribe.... But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326, 98 S.Ct. at 1087 (emphasis added). Speaking precisely to the issue presented in our case, the Court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts." *Id.* (citing *Oliphant*, 435 U.S. at 191, 98 S.Ct. at 1011).

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort: It is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. More important, when cited by the Court in support of its analysis in *Wheeler*, it is the only characterization of *Oliphant* that makes sense. As the Eighth Circuit recognized, "[t]he *Wheeler* Court's analysis distinguishing nonmember Indians from tribal members was not inadvertent. Its very analysis requires such distinction." *Greywater*, 846 F.2d at 491. If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*.³

But *Oliphant* and *Wheeler* were only the first manifestations of the Court's emerging theory limiting tribal jurisdiction to members of the tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court con-

sidered whether a state could impose various state taxes on cigarettes and other items sold by tribal enterprises on the reservation. The Court held that the state could properly tax sales to nonmembers of the tribe, but not sales to members. Most important, the Court addressed the issue—crucial in our case—of the status of the Indians who were not members of the tribe in question:

[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.

Id. at 161 100 S.Ct. at 2085 (emphasis added); see also *id.* at 187, 100 S.Ct. at 2098 (Rehnquist, J., concurring in part) ("[t]he fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share"). Although the Court was discussing a tribe's immunity from taxation, not its criminal jurisdiction, the Court was clearly drawing on a broader theory of tribal sovereignty: A tribe acts as a sovereign only with respect to its own members.

3. The majority minimizes *Wheeler* by describing its use of the term "nonmember" as "indiscriminate." 851 F.2d at 1140. The fact that the Court refers to both nonmembers and non-Indians in some of its opinions does not, however, reveal sloppy thinking or the random use of language. When the Court merely describes the facts presented by *Oliphant* or other cases, it usually employs the term non-Indian. See, e.g., *Montana v. United States*, 450 U.S. 544, 565-66,

101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). When it discusses its rationale, the Court repeatedly distinguishes along the line of tribal membership and not race. See, e.g., *Montana*, 450 U.S. at 563-64, 101 S.Ct. at 1257-58; *Colville*, 447 U.S. at 153-61, 100 S.Ct. at 2082-83.

The panel disregards *Colville*, just as it disregards *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), where the Court provided its most explicit statement yet as to the boundaries of tribal sovereignty. *Montana* draws a clear distinction between a tribe's power over its own members and its power over nonmembers. At issue was whether a tribe could prohibit hunting and fishing by nonmembers on reservation land not owned by the tribe. Applying the principles announced in *Wheeler*, the Court concluded that the tribe could not prohibit such activities:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. at 1257 (emphasis added; citations omitted). Significantly, the Court viewed its conclusion as flowing

4. The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. The states already exercise exclusive jurisdiction over similar offenses (both violent and victimless) committed on the reservation involving solely non-Indian defendants and victims. See F. Cohen, *Handbook of Federal Indian Law* 352-53 & n. 47 (1982 ed.). The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. Any such disparate treatment would violate the equal protection clause of the fourteenth amendment, subjecting state officials to liability under 42 U.S.C. § 1983 (1982). See *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (state officials liable under section 1983 where they know or should know that their conduct violates a clearly established constitutional right); *Smith v. Ross*, 482 F.2d 33,

from the rationale of *Oliphant*: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S.Ct. at 1258 (emphasis added; footnote omitted). The exercise of criminal jurisdiction is plainly an "inherent sovereign power."

As the Eighth Circuit recognized, "in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have the responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as 'casual references' deserving 'little weight,' 851 F.2d at 1141, while overlooking others altogether, is inappropriate."

36 (6th Cir.1973) (per curiam) (law enforcement officers may be liable under section 1983 for failure to enforce the law equally and fairly); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to single out Indians in ways "that might otherwise be constitutionally offensive"). The panel cites no support for its proposition.

The far more plausible assumption is that states would exercise their jurisdiction fully and responsibly. Non-Indian residents of reservations apparently outnumber nonmember Indian residents by a substantial margin. Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc at 9-10; see *Greywater*, 846 F.2d at 493. The states would therefore experience only a marginal increase in law enforcement responsibilities on the reservation. Moreover, some tribes already restrict their own criminal jurisdiction to tribal members. See, e.g., *Quachan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 & n. 4 (9th Cir.1976) (declining to rule on whether the tribe has inherent power to assert criminal jurisdiction

B. Equal Protection

Another very troubling aspect of the panel's opinion is its handling of Duro's equal protection claim. Duro argues that, by asserting jurisdiction over Indians but not over non-Indians, the tribe has violated the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8) (1982 & Supp. IV 1986). While a distinction based solely on tribal membership could be sustained on a rational basis alone, Duro contends that the distinction in this case is based on race and does not survive strict scrutiny. The panel rejects this argument and, in doing so, makes two fundamental errors. First, the majority relies on cases holding that Congress need not have a compelling governmental interest in enacting statutes that discriminate between Indians and non-Indians in order to survive an equal protection challenge. See *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (federal jurisdiction over Indian defendants under Major Crimes Act, 18 U.S.C. § 1153); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (Bureau of Indian Affairs employment preference for enrolled Indians). These cases are inapposite where there is no congressional pronouncement on the issue and the tribe is exercising its retained sovereignty. Second, the panel holds that the classification in question is not racial at all because race is merely one of several factors that go into drawing the distinction at issue. This holding cannot be squared with established principles of equal protection.

The considerations that led the Court to uphold congressional Indian/non-Indian distinctions are irrelevant where, as here, Congress has not acted. The Constitution has been interpreted as granting Congress "plenary power . . . to deal with the special problems of Indians." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483; see *Antelope*, 430

U.S. at 645, 97 S.Ct. at 1398; U.S. Const. art. I, § 8. Moreover, congressional enactments affording special treatment to Indian tribes and their members are based on a long "history of treatment and the assumption of a 'guardian-ward' status." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483. Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians'." *Antelope*, 430 U.S. at 646, 97 S.Ct. at 1399 (quoting *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24); see also *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484 (BIA preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Flaker v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party).

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books. *Mancari*, 417 U.S. at 552, 94 S.Ct. at 2483; see *id.* at 555, 94 S.Ct. at 2485 (permitting special treatment of Indians so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

On the other hand, the Court has never held that a tribe may exercise its authority in a racially discriminatory manner. As the Court held in *Wheeler*, Indian tribes derive their power to conduct criminal tri-

over nonmembers because tribal constitution permits criminal jurisdiction only over members; Cohen, *supra* note 3, at 357 n. 77 ("[o]ther tribes have laws restricting tribal jurisdiction to members"). Presumably some authority steps in to fill the jurisdictional void created in such cases; the states are a logical

choice. See *id.* at 357 n. 79 ("[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader"); *Greywater*, 846 F.2d at 490 n. 3 ("Petitioners were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident").

als not from Congress but from their own retained sovereignty. The two are quite different. Indian tribes may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The panel's holding that they may is without precedent or authority.

More disturbing still, the panel holds that the distinction based on Indian status is not a racial classification because factors other than race are taken into account. 851 F.2d at 1144. While this may be true when the distinction is made by Congress, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977). Either race was considered in the decision, in which case strict scrutiny is invoked, or race was not considered, in which case the rational basis standard applies. You can't have it both ways. In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. *See id.* (racially dis-

5. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) suggested that, because tribes are sovereigns pre-existing the Constitution, they may be exempt from constitutional provisions (such as the fifth and fourteenth amendments) limiting the power of federal and state authorities. The equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(f), however, extends to any person within a tribe's jurisdiction. While ICRA's equal protection clause may not be coextensive with the constitutional equal pro-

tection clause, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir.1976); *Woundad Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir.1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n. 9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

C. Potential for Biased Tribunals

There is yet another troubling aspect of the opinion: its failure to address or even consider the possibility that it may be subjecting Duro to adjudication by a biased tribunal. Judge Sneed, in dissent, gave the subject thoughtful attention. 851 F.2d at 1161-62 (Sneed, J., dissenting). The *Greywater* panel thought the matter significant enough to merit discussion:

As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Greywater, 846 F.2d at 493. The *Duro* majority ignores the subject.

Indian tribes differ in material respects from political entities to which we are accustomed. They have broad authority to

tection clause, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir.1976); *Woundad Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir.1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n. 9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

determine the qualifications for membership, which often are based on degree of tribal blood. Cohen, *supra* note 5, at 20-23. To be eligible for membership in the Salt River Pima-Maricopa Indian Community, a person must not be a member of another tribe. Salt River Pima-Maricopa Community Const. art. II, § 1; Salt River Pima-Maricopa Community Code § 2-1(a) (Supp. No. 2). As noted, Duro is thus ineligible for membership in the community which will decide his fate. The exclusion of otherwise eligible individuals who belong to another tribe underscores the possibility that those who do not qualify for tribal membership may be treated in an unfair or discriminatory fashion. Indeed, the possibility that there may be hostility or mistrust between Indian tribes is not a far-fetched concern. As reported in testimony given recently before the Civil Rights Commission, at least one such situation currently exists, giving rise to what many perceive as miscarriages of justice:

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute....

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court.... It is my personal experience that these individuals have experienced a violation of their ... right to trial by impartial jury....

I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of

an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.

... Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land.... [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed....

Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights (Aug. 13-14, 1987) at 219-20 (testimony of Lee Brook Phillips, attorney).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1161 (Sneed, J., dissenting).

III

Despite warnings from Judge Sneed's powerful and persuasive dissent, despite the unanimous decision of another circuit, the court today stands by a panel opinion that simply does not do justice to the sensi-

tive and important issues presented to us.
I respectfully dissent.



Jimmy NEUSCHAFER,
Petitioner-Appellant,

v.

Harol WHITLEY; Attorney General for
the State of Nevada,
Respondents-Appellees.

No. 88-1688.

United States Court of Appeals,
Ninth Circuit.

Argued Feb. 29, 1988.

Submitted May 6, 1988.

Decided Nov. 3, 1988.

State prisoner sought habeas corpus. The United States District Court for the District of Nevada, Edward C. Reed, Jr., Chief Judge, 674 F.Supp. 1418, dismissed and petitioner appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that petitioner's claim that he did not assert some of his claims in his first federal petition because they were unexhausted precluded a finding that he deliberately withheld those claims from his first federal petition and thereby abused the writ when he brought a second petition asserting those claims.

Reversed and remanded.

Chambers, Circuit Judge, filed a concurring opinion.

Alarcon, Circuit Judge, filed an opinion concurring in the result.

1. Habeas Corpus ¶87

When petitioner has not exhausted his state remedies before filing a federal habeas petition, district court may hold that federal petition in abeyance, issue a stay of

execution, and allow the petitioner an opportunity to exhaust his state remedies. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

2. Habeas Corpus ¶113(12)

District court's decision to deny consideration on the merits of a petition for habeas corpus because it is abusive or successive is reviewed for abuse of discretion. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

3. Habeas Corpus ¶7

"Abusive" habeas corpus petition raises grounds that were available but not raised in an earlier petition, whereas a "successive" petition raises grounds identical to those in a prior petition; there are different standards that determine when a court may dismiss a petition as abusive and when it may dismiss one as successive. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ¶7

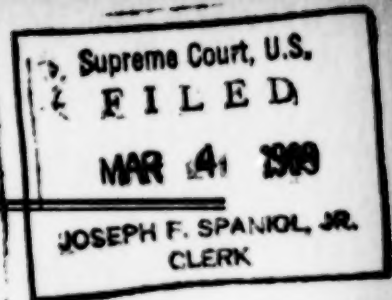
Court abuses its discretion when it bases its decision to dismiss a habeas corpus petition as abusive or successive on an erroneous legal conclusion or on a clearly erroneous finding of fact. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

5. Habeas Corpus ¶7

Federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner made a conscious decision deliberately to withhold them from a prior petition, is pursuing needlessly piecemeal litigation, or has raised claims only to vex, harass, or delay. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially

OPPOSITION BRIEF

3
No. 88-6546



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT DURO,
Petitioner,
versus

EDWARD REINA, CHIEF OF POLICE, SALT
RIVER DEPARTMENT OF PUBLIC SAFETY, SALT
RIVER PIMA-MARICOPA INDIAN COMMUNITY; AND
THE HON. RELMAN R. MANUEL, SR., CHIEF JUDGE
OF THE SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY COURT,
Respondents.

ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF
CETIORARI**

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1108

QUESTIONS PRESENTED

1. Does the fact that Albert Duro, an enrolled member of the Cahuilla Indian Tribe who worked and lived on the Salt River Pima-Maricopa Indian Community, is not an enrolled member of the Salt River Pima-Maricopa Indian Community deprive the Salt River Pima-Maricopa Indian Community of misdemeanor criminal jurisdiction over him?

2. Should well established "equal protection" rules concerning enrolled Indians be overruled by now characterizing status obtained by enrollment as the equivalent of inherent racial characteristics?

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STATEMENT OF THE CASE

Albert Duro is an enrolled member of the Cahuilla Indian Tribe. He was born on June 17, 1958. He lived with Debbie Lackey, an enrolled member of the Salt River Pima-Maricopa Indian Community ("Community"), intermittently from 1980 through the latter part of 1984. The Community is comprised of two separate Indian tribes, the Pima and the Maricopa.¹ It is a 52,729 acre reservation which includes less than 30 acres of fee land. There are over 4000 enrolled members all but 200 of which live on the reservation along with 2600 other people, many of which are Indians enrolled in other tribes.² It is located close to the Gila River Indian Community ("Gila River").

Gila River encompasses 372,000 acres of which 160 are fee. There is also a "school section" belonging to the State of Arizona by virtue of its admission into the Union in 1912. The rest is tribal or allotted land. There are 11,700 enrolled members of which 10,400 live on the reservation along with 3,000 other Indians and 150 non-Indians. As with the Community, Gila River is composed of members of the two separate tribes, the Pima and Maricopa.

From early February until mid-June, 1984, Duro and Lackey lived on the Community's reservation where Duro was employed by Picopa Construction Company, a Community owned entity.

¹ The Pimas and Maricopas are culturally different peoples. L. SPIER, YUMAN TRIBES OF THE GILA RIVER (1970)

² The Port Madison Reservation, which was the subject of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), consisted of 7276 acres of which 4580 was fee land. Of the 2975 persons who lived on it, 2925 were non-Indians and only 50 were Indian.

The Devil's Lake reservation, which was the subject of *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) is comprised of 245,000 acres of which 185,000 acres are fee. 2487 enrollees reside on the reservation along with 830 non-enrollees.

IN THE
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OCTOBER TERM, 1988

ALBERT DURO,
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versus

EDWARD REINA, CHIEF OF POLICE, SALT
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OF THE SALT RIVER PIMA-MARICOPA INDIAN
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Respondents.

ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF
CETIORARI**

The respondents submit this brief in opposition to the petition for writ of certiorari to the Ninth Circuit Court of Appeals.

On June 3, 1984, Duro was arrested by Community police on alcohol and marijuana possession charges under the Community Code of Ordinances.³ He entered a plea of guilty and was sentenced by the Community court to pay a fine by June 15, 1984. The same marijuana offense under Arizona law constitutes a felony punishable by 1½ to 7 years in prison. A.R.S. §§ 13-3405, 13-701. Duro did not pay the fine. Instead, he absconded to California.

On June 19, 1984, federal agents arrested Duro in California on a Federal Grand Jury Indictment charging him with the murder of Philip Brown, a young boy who resided in the Community but who was enrolled at the Gila River reservation. The charged murder had been committed within the confines of the Community.

After his return to Phoenix the indictment was quashed without prejudice. Duro was turned over to the custody of the Community Department of Public Safety and charged with the unlawful discharge of firearms with the boundaries of the Community. The offense is a misdemeanor. In fact, the misdemeanor "unlawful discharge" was the same shooting alleged to have caused the death of Philip Brown.

Duro then sought habeas corpus from the U.S. District Court on the basis that the Community had no jurisdiction over him solely because, although an Indian, he was not

³ The Community Code was approved by the Secretary of the Interior. The *Oliphant* code had not been.

The Secretary has promulgated regulations which provide that trials before Courts of Indian offenses (courts that are established for tribes that do not have their own court system) shall apply to all Indians. "Any Indian who violates an ordinance . . . which was promulgated by the tribal council and approved by the Secretary of the Interior shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance (emphasis added)." 25 CFR § 11.74; *Accord* 25 CFR § 11.2: The court "shall have jurisdiction over all offenses committed by any Indian within the reservation." There is no reason to distinguish between the courts of Indian offenses and tribal courts.

enrolled in the Community.⁴ The district court granted habeas corpus. Duro was released and disappeared. The Court of Appeals for the Ninth Circuit reversed. *Duro v. Reina*, 821 Fed. 1358 (9th Cir. 1987). Thereafter it amended its opinion. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988). It denied a rehearing and an *en banc* rehearing. *Duro v. Reina*, 860 F.2d 1463 (9th Cir. 1988). Duro remains at large not having surrendered himself to the Community Department of Public Safety.

REASONS FOR DENYING THE WRIT

Preliminary Consideration

Is a criminal appellant who has placed himself beyond the jurisdiction of the court that seeks to try him entitled to have his appeal heard?

Duro's whereabouts have not been disclosed. He is not subject to extradition by the Community. There are no Community agreements with any state and federal law does not provide for such. 18 U.S.C. Chapt. 209. A certain practical mootness pervades the Petition for Certiorari. A fugitive defendant is not entitled to an appeal. *Molinaro v. New Jersey*, 396 U.S. 365 (1970); *Compare United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1984).

Conflict in the Circuits

Petitioner asserts a conflict between *Duro* and the Eighth Circuit holding in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). Petitioner is correct. In *Greywater*, however, the Circuit Court opinion noted that the defend-

⁴ Duro was determined to be an Indian, not because of any blood quantum determination by the Community, but on the basis of his status as an enrolled member of the Cahuilla Indian Tribe. That enrollment was not occasioned by any action of the Community.

ants were allegedly told by the tribal court judge that they would not receive a fair trial because they were not Sioux. The only tribal member who was involved in the alcohol/driving offense, indeed the driver, was never charged. *Greywater*, 846 F.2d at 489. Such conduct, regardless of the enrollment status of the parties, called for federal intercession under the Indian Civil Rights Act (25 U.S.C. §§ 1302, 1303) and the question of enrollment need never have been reached. There is no suggestion of underlying unfairness in the Community's judicial system.

Timeliness

The only commonality of *Duro* and *Greywater* is that the defendants were not enrolled in tribes that attempted to try them. The variety of circumstances involving tribal membership and tribal reservations spread far beyond the facts in *Duro* and *Greywater*: Non-member Indian spouses living the whole of their adult lives on tribal reservations of which they are not members; Their children enrolled in a distant tribal reservation; Misdemeanors committed by members of a tribe whose only connection with the tribal reservation is on the occasion of the commission of a misdemeanor; Indians visiting cousins on nearby reservations whose population consists of the same tribes as their home membership reservation, i.e. the Community and the Gila River Indian Community.

This is not the time for this Court to exercise its discretion to issue a Writ of Certiorari. As Mr. Justice Frankfurter observed, "It may be desirable to have different aspects of an issue further illuminated by the lower courts." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). In the absence of such illumination a decision of this Court might cause confusion in regard to fact situations not within the scope of *Duro*. The decision of the Court of Appeals for the Ninth Circuit ratified the customary

administration of justice in Indian country. It does not create new, untested or dangerous schemes for the administration of justice.

Fairness

There is no suggestion that *Duro* was poorly treated by the Community. He earned wages by virtue of his association with the Community. He earlier submitted to the misdemeanor jurisdiction of the Community. He might have been subject to the more severe criminal sanctions of the Arizona criminal courts. *Duro v. Reina*, 851 F.2d 1136, 1146, (9th Cir. 1988). He has kept himself beyond the jurisdiction of the Community notwithstanding the mandate of the Ninth Circuit. There is no compelling reason for this Court to exercise its discretion.

Equal Protection

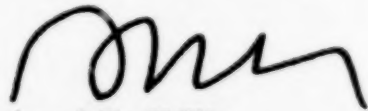
Petitioner attempts to raise an "equal protection" issue, asserting that in order to determine who is an Indian, racial considerations must be raised. This Court has disposed of that notion a number of times. *United States v. Antelope*, 430 U.S. 641 (1977); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). As for the denial of full political participation, *Compare United States v. Mazurie*, 419 U.S. 544 (1975). "The fact that [they] could not become members of the tribe and therefore could not participate in the tribal government, does not alter our conclusion." *Mazurie*, 419 U.S. at 557.

No measurements were made of *Duro*'s blood by the Community. Evidence of his enrollment in another tribe and his assertion that he was an Indian were clearly sufficient.

Conclusion

While the holdings of the Ninth Circuit in *Duro* and the Eighth Circuit in *Greywater* are in conflict on the law, the decision by the Ninth Circuit does not change the consistent practice of Indian tribes to maintain law and order within tribal reservations by prosecution of Indian offenders whether enrolled in the particular tribe or not. *Duro* retains a status quo which has worked in Indian country, which recognizes the particular status of Indian people, and which assures fairness under the provisions of the Indian Civil Rights Act (25 U.S.C. §§ 1302, 1303). Moreover, the absence of Albert Duro from the Community's justice system creates a situation in which the case is for all practical purposes moot. The petition should be denied.

Respectfully submitted,



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ORIGINAL

88-6546 (4)

Supreme Court, U.S.
FILED
MAR 23 1989
JOSEPH F. SPANIOLO, JR.
CLERK

No.

IN THE
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ALBERT DURO,
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EDWARD REINA, Chief of Police,
Salt River Department of Public
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Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,
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Re
PETITIONER'S BRIEF IN REPLY TO THE
RESPONDENT'S OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

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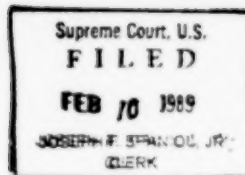
Counsel for Petitioner

March 23, 1989

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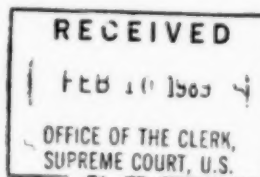
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Albert Duro, by and through his attorney, hereby notifies the Supreme Court and counsel for all parties that lines 1 and 2 of page 5 of the Petition for a Writ of Certiorari to the United States Supreme Court was mistakenly omitted due to a computer malfunction. Lines 1 and 2 should have read:

The majority Opinion of the Court of Appeals -- in a case of "first impression" -- brushed aside or dismissed the explicit language of several opinions . . .

An original and copies of page 5 of the petition to the United States Supreme Court, including lines 1 and 2, are also enclosed for the convenience of the Court and counsel for all parties. The attached page 5 may simply be substituted for page 5 of the original petition. We apologize for the apparent computer error that occurred in omitting lines 1 and 2 of the original petition.

Respectfully submitted,

Dated February 6, 1989

John Trebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

A copy of the foregoing
was hereby mailed this
6th, of February, 1989, to:

Richard B. Wilks and
Sonya M. Tablonsky
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Rodney B. Lewis
Attorney at Law
P.O. Box 400
Sacaton, Arizona

Albert Duro

By Susan K. Eaton
Susan K. Eaton

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ORIGINAL

88-6546

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court.

Respondents.

PROOF OF SERVICE

STATE OF ARIZONA)
County of Coconino) SS

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANOL, JR.
CLERK

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Court of Appeals for the Ninth Circuit; that on January 31, 1989, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, and with an additional copy of the petition and affidavit of mailing to counsel for respondent:

Richard B. Wilks and
Sonya M. Tablonsky
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Rodney B. Lewis
Attorney at Law
P.O. Box 400
Sacaton, Arizona

Dated at Flagstaff, Arizona, this 31st day of January,
1989.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 31st day of January, 1989,
by John Trebon.

Susan K. Gaton
Notary Public

My Commission Expires:

My Commission Expires June 5, 1992

88-6546

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,


Respondents.

MOTION FOR APPOINTMENT
OF COUNSEL

Albert Duro was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. Section 3006A in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Duro, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Duro, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

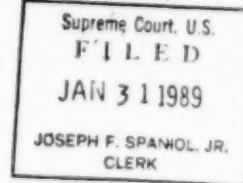
Respectfully submitted,

Dated: January 31, 1989


John Trebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

ORIGINAL



No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
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R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,

Respondents.

PETITIONER'S BRIEF IN REPLY TO THE
RESPONDENT'S OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

John Trebon
Arizona Bank Building
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

March 23, 1989

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,
Petitioner,
v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,
Respondents.

The petitioner, Albert Duro, by and through his attorney,
submits the following brief in reply to the respondent's brief and
opposition to the Petition for Writ of Certiorari.

MR. DURO IS NOT A FUGITIVE

This Court should accept jurisdiction of Mr. Duro's case based upon the reasons set forth in Mr. Duro's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

We believe that the reasons set forth by Mr. Duro in his original brief in support of the Petition for Writ of Certiorari is sufficient to overcome the respondent's brief and opposition to the Petition for Writ of Certiorari. However, one erroneous point raised by the respondent must be addressed. Contrary to the respondent's bare assertions, Mr. Duro is not a fugitive.

The respondent's assertions relating to the fugitive status of Mr. Duro are unsupported by the record in this case and are simply contrary to objective fact. Mr. Duro has never "disappeared". Instead, once he was released by order the United States District Court, he simply went home. Mr. Duro continues to reside at his residence within the State of California. He remains in contact with his attorney.

While the Court of Appeals for the Ninth Circuit has remanded Mr. Duro's case to the district court, it did not order Mr. Duro to surrender himself to the Salt River Pima-Maricopa Indian Community. Moreover, the district court has not yet acted upon Mr. Duro's case after remand. Indeed, the respondent has not requested that the district court order Mr. Duro to return.

The respondent has not even attempted to ascertain the location of Mr. Duro. Indeed, the respondent's ruthless accusations that Mr. Duro has "disappeared" or "absconded to California" or remains a "fugitive" are simply untrue.

The baseless accusations of the respondent only serve to reveal its inability to offer legitimate reasons for this Court not to accept Mr. Duro's case for review. While the respondent is obviously grasping at straws to support its position before this Court, it inappropriately casts spears at Mr. Duro. Its position is unfounded.

The respondent's failure to enter into any extradition agreements with any other tribal government, such as the Cahuilla Indian Tribe, has apparently rendered it unable to summons the personal appearance of Mr. Duro from the State of California. The respondent's failure to enter into compacts or treaties with other Indian Tribes does not make Mr. Duro a fugitive. The failure of federal law to provide for extradition powers in favor of Indian Tribes does not render him a fugitive.

The respondent's position is not only erroneous as a matter of fact, but unfounded as a matter of law. In the case of Molinaro v. New Jersey, 396 U.S. 365 (1970), this Court declined to adjudicate his case AFTER HE WAS CONVICTED AND HIS BAIL WAS REVOKED FOR FAILURE TO SURRENDER TO STATE AUTHORITIES. Mr. Duro has not been convicted of any offense, he has never failed to appear for any court proceeding, and he has never failed to obey any court order relating to this case. Neither the respondent or the federal district court has set any proceeding or hearing calling for his appearance or surrender.

No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction.

Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).


The majority of cases finding that the defendant was "disentitled" from seeking appellate review have relied upon the defendant's "escape" from custody after conviction. See Annotation, Effect of Escape from State Custody on Petitioner's Rights in Federal Habeas Corpus Proceedings, 61 ALR Fed. 938 (Supp. 1988). Mr. Duro has never been convicted of any offense and has never failed to abide by any court order relating to this case. He is not a fugitive from justice.

It is interesting to note that counsel for both parties have recently responded to the district court's action in setting a "status conference" by agreeing that no issues exist for resolution at the present time, including the physical custody or return of Albert Duro. See the plaintiff's "Status Report and Request to

Vacate Hearing" dated March 7, 1989, as well as, the respondent's "Request to Vacate Hearing" dated March 7, 1989, which are attached hereto and incorporated by reference in the Appendix as Exhibits "A" and "B". Mr. Duro has clearly not "disentitled" himself from review by this Court.

Respectfully submitted.

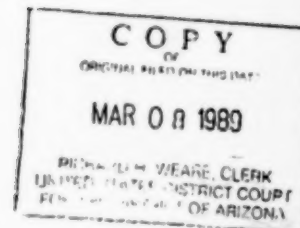
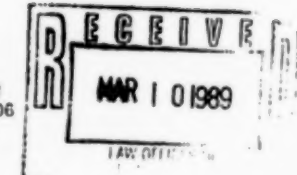
Dated: March 23, 1989


John Hebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

APPENDIX

John Trebon
Attorney At Law
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, AZ 86001
(602) 779-1713



Attorney for Plaintiff.
AZ. State Bar No. 003575

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ALBERT DURO,)	
Plaintiff,)	Case No. CIV-84-2107 PHX-RGS
vs.)	
EDWARD REINA, et. at.,)	STATUS REPORT AND REQUEST TO
Defendant.)	VACATE HEARING

Albert Duro, by and through his attorney, John Trebon, requests that this Court cancel the status hearing scheduled for April 3, 1989. Counsel for Mr. Duro has recently filed a Petition for Writ of Certiorari to the Ninth Circuit with the United States Supreme Court. The respondents are currently in the process of responding to the petition for writ of certiorari.

Counsel for Mr. Duro has recently discussed the status of the case with counsel for the respondents, namely Richard Wilks, Shea and Wilks. Mr. Wilks agrees that there is no further need for a status conference at this time. There are currently no issues that need to be resolved by the district court. Indeed, counsel for both parties agree that no action should be taken by the district court with respect to the Duro case at this time.

EXHIBIT A

John Trebon
Attorney At Law
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, AZ 86001

1 Therefore, we request that this court vacate the status
2 conference scheduled for April 3, 1989, at 9:00 a.m. Moreover,
3 please be informed that counsel for Mr. Duro, John Trebon, is
4 scheduled to appear at three other matters within Coconino County,
5 Arizona, on April 3, 1989. Therefore, in any event, he requests
6 that the status conference scheduled for April 3, 1989, be
7 cancelled or reset.

8 Respectfully submitted this 7 day of March, 1989.

John Trebon HKE
JOHN TREBON,
Attorney for Albert Duro

12 A copy of the foregoing
13 was hereby mailed this
14 7 of March, 1989, to:

15 Richard D. Wilks and
16 Sonya M. Tablonsky
17 Shea and Wilks
18 114 W. Adams
19 Suite 200
20 Phoenix, Arizona 85003

21 Albert Duro

22 By Sue Eaton
23 Susan K. Eaton
24
25
26

1 Melvin J. Mirkin, No. 765
2 SHEA & WILKS
3 114 W. Adams, #200
4 Phoenix, AZ 85003
5 (602) 257-1126

6 Attorneys for Defendants

7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE DISTRICT OF ARIZONA

9 ALBERT DURO)

10 Plaintiff,)

11 v.)

12 EDWARD REINA, et al.,)

13 Defendants.)

Case No. CIV-84-2107 PHX-RGS

REQUEST TO VACATE HEARING

14 The attorneys for the defendants support plaintiff's Request
15 to Vacate Status Hearing. If the request is denied, attorneys
16 for defendants can appear and explain the status on behalf of
17 both plaintiff and defendants (agreed to by telephone call from
18 undersigned to plaintiff's attorney on March 6, 1989).

19 Respectfully submitted March 7, 1989.

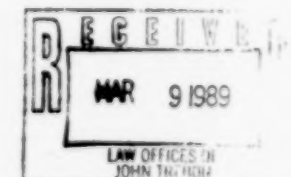
20 SHEA & WILKS

21 By M.J. Mirkin
22 Melvin J. Mirkin
23 Attorneys for the Defendants

24 COPY of the foregoing mailed
25 March 7, 1989 to:

26 John Trebon
27 121 E. Birch, Suite 506
28 Flagstaff, AZ 86001
Attorney for Plaintiff

Stephen M. ...



SHEA & WILKS
A PROFESSIONAL ASSOCIATION
114 W. ADAMS ST. SUITE 200
PHOENIX, ARIZONA 85003-2084
(602) 257-1126

SUBSCRIBED & SWORN to before me this 23 day of March, 1989, by
John Trebon.

Susan K. Eaton
Notary Public

My Commission Expires:
My Commission Expires June 6, 1992

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,
Petitioner,
v.

EDWARD REINA, Chief of Police,
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,
Respondents.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and says that he is a member of the Bar of the Court of Appeals for the Ninth Circuit; that on March 23, 1989, the Petitioner's Brief In Reply to the Respondent's Opposition to the Petition for Writ of Certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said Petitioner's Brief and Reply to the Respondent's Opposition to the Petition for Writ of Certiorari, and with an additional copy of the petition and affidavit of mailing to counsel for respondent:

Richard B. Wilks
Sonya M. Tablonsky
Melvin J. Mirkin
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Dated at Flagstaff, Arizona, this 23rd day of March, 1989.

John Trebon
John Trebon, Plaintiff

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

March 21, 1989

AREA CODE 202
479-3011

APPENDIX

John Trebon, Esq.
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, Arizona 86001

RE: Albert Duro v. Edward Reina, etc., et al.
No. 88-6546

Dear Mr. Trebon:

Our records indicate that you have received a copy of the response filed by counsel for the petitioner in the above case. The Court has now directed this office to request that a reply to that response be filed.

One typewritten copy of your reply, together with proof of service thereof, should be filed to reach this office on or before April 4, 1989.

Kindly acknowledge receipt of this letter on the enclosed copy.

Sincerely yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Richard B. Wilks, Esq.
Shea & Wilks
200 First Interstate Building
114 West Adams Street
Phoenix, Arizona 85003-2094

before the trial in this case. Mr. Benett has attempted to argue that this was done because, after all, we had a new bankruptcy law. Well, as Counsel are aware, the new bankruptcy law became law on July 10th; this motion was filed in September. I can go through the file and find the exact date, but as I recall it was just two or three judicial days before the trial.

Therefore, the Court must consider that the last-minute filing of these motions was in bad faith. I think that if there's any doubt in that, it was confirmed by the fact that after this Court denied both of those motions, that the Plaintiff filed a Notice of Intent to Appeal; argued before the Court that the notice automatically stayed the trial until the District Court could resolve the matter. And as I recall—I'm probably not in a position to quote, verbatim—but I recall making the remark to Plaintiff's Counsel that if the motion's granted, it's granted; if it's denied, it's granted if you file a Notice of Appeal. The response to that was something to the effect that, 'That's correct, Your Honor.'

Clearly, the last minute attempt, if nothing else, was done in bad faith in this case; the last-minute attempts to postpone the trial, with no basis for these last-minute attempts, certainly were in bad faith.

(Transcript of Proceedings, October 29, 1984, at 45-47; Bankr. CR 84; emphasis added).

The bankruptcy court did not award the Pughs fees or costs for American's bad faith tactics, however, because it awarded the Pughs fees under ORS 743.114 of the Oregon Insurance Code.⁴

We affirm the judgment of the district court affirming the bankruptcy court's denial of American's request for a jury trial

4. The bankruptcy court held: "In light of this opinion, we need not discuss nor resolve the issue raised by defend-

and reversing the bankruptcy court's award of fees under ORS 743.114. Because the bankruptcy court did not reach the issue of possible bad faith litigation by American, we remand to the bankruptcy court for a determination of this issue.

AFFIRMED and REMANDED.



Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1985.

Decided July 9, 1987.

Nonmember Indian petitioned for writ of habeas corpus and/or writ of prohibition challenging tribal court's assertion of criminal jurisdiction. The United States District Court for the District of Arizona, William P. Copple, J., granted requested relief, and appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that nonmember Indian was subject to criminal jurisdiction of trial court for murder of another nonmember Indian on reservation, where defendant had significant contacts with reservation.

Vacated.

Sneed, Circuit Judge, dissented and filed opinion.

ants that plaintiff has delayed and increased the costs of this litigation in bad faith."

1. Habeas Corpus ¶113(12)

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. Indians ¶38(2)

Nonmember Indian defendant was subject to criminal jurisdiction of tribal court for murder of another nonmember Indian on reservation, where defendant was enrolled in recognized tribe, lived on reservation with member Indian, and was employed by company owned by tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5.

3. Constitutional Law ¶223

Indians ¶38(2)

Extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation does not amount to racial classification in violation of equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

4. Constitutional Law ¶223

Indians ¶38(2)

Policy of extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation is reasonably related to legitimate goal of improving law enforcement on reservations, and thus did not violate equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and
BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I.

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torres-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Reiman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court

for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and removed him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the tribal court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from that judgment.

II.

STANDARD OF REVIEW

[1] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1631, 1633-34 (9th Cir.), cert. denied, — U.S. —, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 169, 172-73, 98 S.Ct. 864, 872, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236,

239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III.

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian*

Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them. The Court's opinion explicitly refers only to non-Indians. However, some subsequent opinions describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173, 102 S.Ct. 894, 920, 71 L.Ed.2d 21 (1982); *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978). Other opinions describe *Oliphant*'s holding as limited to non-Indians. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.¹ The holdings of the cases cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this ar-

gument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. On the one hand, there are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L. Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978)); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). On the other hand, both executive and congressional pronouncements apparently use the word "Indian" to mean "tribal member," implying that non-Indians and nonmembers have the same status. See Comment, *Jurisdiction*

1. A similar inconsistency pervades the opinions of this court. Compare, e.g., *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g., *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir.) (*Oliphant*

eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), cert. denied, 471 U.S. 1013, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

over Nonmember Indians on Reservations, 1980 Ariz.St.L.J. 727, 746-48.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.³ *Id.* at 206, 208, 98 S.Ct. 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over non-member Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim to which we next turn. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

2. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

3. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv. L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

4. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protec-

B. Equal Protection

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.³ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."⁴ *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federally recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*,

tion standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra* note 3. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 1290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), cert. denied, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[2] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that this is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order better to enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S.3092 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 83 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of

treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, — U.S. —, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[3, 4] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.⁸ See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indi-*

8. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already

an Law 888 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, dissenting:

I respectfully dissent. *Oliphant* should govern this case. Two commentators re-

been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

cently have concluded that, for purposes of determining the criminal jurisdiction of tribal courts, *Oliphant* and the history of relevant treaties and statutes suggest that nonmember Indians and non-Indians be treated the same. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1022 n. 251 (1981); see Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 737-49. The Supreme Court made this conclusion explicit in *United States v. Wheeler*, 435 U.S. 313, 322, 324, 326-27, 328, 98 S.Ct. 1079, 1085, 1086, 1087-88, 1088, 55 L.Ed.2d 303 (1978), by its emphasis of tribal sovereignty as the source of the tribe's criminal jurisdiction over its members.

Independently of these authorities, the equal protection clause of the Indian Civil Rights Act requires affirmance of the district court. To embrace the differential treatment of non-Indians and nonmember Indians within the context of this case is to employ a classification based upon race. It is true that special treatment of Indians in many situations has not been treated as being based on race but rather on the unique sovereignty of Indian Tribes. See *United States v. Antelope*, 430 U.S. 641, 645-47, 97 S.Ct. 1395, 1398-99, 51 L.Ed.2d 701 (1977). That sovereignty provides no proper basis for depriving a nonmember Indian of an immunity from tribal jurisdiction enjoyed by a non-Indian. Neither does the fact that the determination of who is an Indian sometimes involves factors other than race.

Laws based on racial classifications are subject to strict scrutiny. Extending tribal court criminal jurisdiction to nonmember Indians might incrementally aid law enforcement on reservations. But then so might its extension to non-Indians. However, clearly these extensions are not necessary to achieve a compelling governmental interest. Therefore it fails the applicable equal protection test.

Different tribes do things differently. Indian law traditionally respects the tribes' individuality. See Clinton, *supra*, at 984-

91. Limiting a tribal court's criminal jurisdiction to members of its own tribe is quite consistent with the self-determination of Indian tribes. To bar its extension to nonmember Indians does not significantly impair tribal self-determination.



UNITED STATES of America,
Plaintiff-Appellant,

v.

Roscoe L. LITTLEFIELD,
Defendant-Appellee.

No. 86-1160.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 1987.

Decided July 10, 1987.

Government sought forfeiture of owner's property on which marijuana allegedly was grown. The United States District Court for the Northern District of California, William H. Orrick, Jr., J., determined that forfeiture was authorized only for those persons of property actually used or intended to be used to grow marijuana, and Government appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) owners alleged use of portion of 40-acre parcel of property to grow marijuana subjected entire parcel to forfeiture, but (2) before entering order of forfeiture, district court was required to determine that forfeiture of entire property together with other punishments imposed was not so disproportionate to offense committed as to violate Eighth Amendment.

Reversed and remanded.

1. Drugs and Narcotics — 191

By specifying that property is subject to forfeiture if used in "any manner or

is whether Haberkorn has a legitimate expectation of privacy in the storage unit.

Neither ownership nor presence are required to assert a reasonable expectation of privacy under the Fourth Amendment. A "formalized arrangement among defendants indicating joint control and supervision of the place is sufficient to support a legitimate expectation of privacy." *United States v. Broadhurst*, 805 F.2d 849, 851-52 (9th Cir.1986). If the record "amply indicates a formalized, ongoing arrangement" between the defendants for the storage of chemicals in the storage unit, *id.* at 852, Haberkorn had a reasonable expectation of privacy in the unit. In several cases this court has found that participation in an arrangement that indicates joint control and supervision of the place searched is enough to establish a Fourth Amendment protected privacy interest. See *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984), *cert. dismissed*, 475 U.S. 791, 106 S.Ct. 1623, 89 L.Ed.2d 803 (1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984); *United States v. Johns*, 707 F.2d 1093 (9th Cir.1983), *rev'd on other grounds*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

In the instant case, the indictments charged the defendants with criminal conspiracy as to all the substantive crimes involving the manufacture and possession of the drugs. An affidavit submitted by Haberkorn alleged that he was the co-owner of the chemicals found in the storage unit and the payor of a portion of the rental payments made with respect to the unit. We have before us no other relevant documents.

We are unable to determine on what grounds the district court decided that Haberkorn had no standing. The government in its brief, however, states that for the "purposes of appeal" it does not contest Haberkorn's standing to contest the search. Brief of Appellee United States at 12. Although the indictments and Haberkorn's affidavit do not rise to the level of "stipulated facts," as in *Pollock*, *supra*, these documents do indicate that Johns and Haberkorn were engaged in a joint venture

of some sort at the location of the surreptitious search. Therefore we conclude that Haberkorn has standing to assert his right to any hearing on the admission of evidence relating to the search of the Unit 39 storage space.

REVERSED and REMANDED.

NOONAN, Circuit Judge, concurring in part and dissenting in part:

I concur except as to the last paragraph. I would remand to the district court to determine whether Haberkorn has standing under the standards we are enunciating.



Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1986.

Decided July 9, 1987.

As Amended June 29, 1988.

Nonmember Indian sought writ of habeas corpus and writ of prohibition challenging trial court's assertion of criminal jurisdiction over crime against nonmember Indian on reservation. The United States District Court for the District of Arizona, William P. Copple, J., granted relief. Appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that tribal court had jurisdiction over nonmember Indian who killed nonmember Indian on reservation.

Vacated and remanded.

Sneed, Circuit Judge dissented and filed opinion.

Opinion superseded, 821 F.2d 1358.

1. Habeas Corpus ¶113(12)

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. Federal Courts ¶813

District court's decision to issue writ of prohibition is reviewed for abuse of discretion.

3. Habeas Corpus ¶45(3)

Habeas corpus statute gave district court jurisdiction over Indian's petition to challenge criminal jurisdiction of tribal court, and, thus, court could issue auxiliary writs in aid of its jurisdiction in its sound judgment. 28 U.S.C.A. § 2241(c)(1), (3).

4. Indians ¶32(13)

Tribal court had criminal jurisdiction over nonmember Indian who allegedly killed nonmember Indian on reservation and had criminal jurisdiction over crimes committed by Indians against Indians without regard to tribal membership. 18 U.S.C.A. §§ 1111, 1151 et seq., 1152, 1153; Klamath Termination Act, § 1 et seq., 25 U.S.C.A. § 564 et seq.

5. Indians ¶36

Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under statute governing applicability to Indian country of criminal laws applicable in areas of exclusive federal jurisdiction. 18 U.S.C.A. § 1152.

6. Constitutional Law ¶82(2), 210(1)
Indians ¶32(4)

Neither bill of rights nor Fourteenth Amendment limits authority of Indian tribes. U.S.C.A. Const.Amend. 14.

7. Indians ¶32(5)

Equal protection provision of Indian Civil Rights Act extends to any person, even non-Indian, within jurisdiction of tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

8. Indians ¶32(5)

Equal protection standard of Indian Civil Rights Act is no more vigorous than Fifth Amendment counterpart. U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

9. Indians ¶1

Members of terminated tribes do not qualify as Indians regardless of their race. 18 U.S.C.A. §§ 1152, 1153.

10. Indians ¶1

Enrolled members of tribes qualify as Indians if there is some evidence of affiliation, such as residence on reservation and association with other enrolled members. 18 U.S.C.A. §§ 1152, 1153.

11. Indians ¶1

Person of mixed blood who is enrolled in recognized tribe or otherwise affiliated with it may be treated as Indian. 18 U.S.C.A. §§ 1152, 1153.

12. Indians ¶32(13)

Tribal courts may define criminal jurisdiction according to complex notion of who is Indian according to totality of circumstances, including genealogy, group identification, and life-style. 18 U.S.C.A. §§ 1152, 1153.

13. Indians ¶32(13)

Nonmember Indian's contacts justified tribal court's conclusion that nonmember Indian was Indian subject to its criminal jurisdiction; Indian was enrolled in recognized tribe, was closely associated with court's tribe through his girl friend, a tribal member, his residence with her family on reservation, and his employment with company owned by tribe.

14. Constitutional Law ¶223

Indians ¶32(13)

Extending tribal court criminal jurisdiction to nonmember Indians with significant contact with reservation does not amount to racial classification for purposes of equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const. Amends. 5, 14.

15. Constitutional Law ¶223

Indians ¶32(13)

Extending tribal court criminal jurisdiction to nonmember Indian was reasonably related to legitimate goal of improving law enforcement on reservation and did not violate equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const.Amends. 5, 14.

16. Indians ¶38(2)

Federal court would have no criminal jurisdiction over nonmember Indian who shot nonmember Indian on reservation, if courts treat defendant and victim as non-Indians. 18 U.S.C.A. §§ 13, 1152, 1153.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was

born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Reiman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and moved him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River

Department of Public Safety. On October 19, the trial court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from the judgment.

II

STANDARD OF REVIEW

[1-3] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 474 U.S. 841, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice be-

tween recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them.¹ The Court's opinion explicitly re-

1. In a recent decision, *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988), the Eighth Circuit concluded that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe.

The Eighth Circuit acknowledged that the Supreme Court in *Oliphant* held that the Suquamish Tribal Court lacked authority to exercise

criminal jurisdiction over non-Indians and that Congress had not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians. *Greywater* acknowledges that 18 U.S.C. § 1152 may seem to indicate that Congress' use of the term "Indian" was meant to include all Indians regardless of tribal affiliation and while acknowledging the sovereign

fers only to non-Indians. The Court never used the term "nonmember." However, the Supreme Court in one subsequent dissent and one subsequent opinion describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-3, 102 S.Ct. 894, 919-20, 71 L.Ed.2d 21, 50-52 (1982) (Stevens, J. dissenting). This case only concerned the Indian tribe's authority to impose a mining severance tax on non-Indians who were mining on the reservation. The majority opinion on occasion, and for no apparent reason, uses the term "nonmember" when discussing the power of the tribe to tax "non-Indians." *Id.*, 102 S.Ct. at 903-5. This change in terms has no relevance to the decision. It is clear that the Court is discussing the tribe's authority to tax "non-Indian" miners not "nonmembers."

Justice Stevens' dissent in addressing the authority of the tribe to tax the non-Indian lessees who produce oil and gas from within the tribe's reservation in dicta miscasts *Oliphant* as holding that tribes "have no criminal jurisdiction over crimes committed by nonmembers within the reservation." *Id.* at 919. In his analysis of the power of the tribe to tax, Justice Stevens interchanges the terms "nonmember" and "non-Indian." The majority rejected his analysis that the power of an Indian tribe to exclude nonmembers was the basis for imposing a

power of tribes to punish offenses against tribal law by members of a tribe found that federal preemption of a tribe's jurisdiction to punish its members for infraction of tribal law would detract substantially from tribal self-government. However, the Eighth Circuit ultimately found that the Devils Lake Sioux Tribe's exercise of criminal jurisdiction over nonmember Indians is beyond what is necessary to protect the rights essential to the tribe's self-government and is inconsistent with the overriding interest of the federal government in ensuring that its citizens are protected from unwarranted intrusions upon their personal liberty. For the reasons expressed in this amended opinion, we do not find the Eighth Circuit's reasoning persuasive.

2. A review of several of the authorities cited in the *Oliphant* opinion fortifies the point that its application is limited to the lack of tribal court criminal jurisdiction over non-Indians not nonmember Indians. E.g. *Ex Parte Kenyon*, 14

tax on the nonmembers, *Id.* at 903, 919-920.

In *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978), Justice Stewart in dictum stated that *Oliphant* stands for the proposition that nonmembers cannot be tried in tribal courts. The term "nonmember" was used throughout the *Wheeler* opinion, however, nonmember status was not in issue as *Wheeler* was a member of the Navajo tribe, who was tried by the Navajo tribal court for a Navajo tribal code violation. At issue was not the jurisdiction of tribal courts but the possible double jeopardy effect of a prior tribal court conviction in a federal rape prosecution. The indiscriminate use of the term "nonmember" throughout the *Wheeler* opinion, 435 U.S. at 322-28, 98 S.Ct. at 1085-89, amplifies the point that Justice Stewart's statement is merely dictum. To the contrary two other Supreme Court opinions describe *Oliphant*'s holding as limited to non-Indians. See *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985) (tribal court power to exercise civil subject matter jurisdiction over non-Indians); *Washington v. Confederated Tribes*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).³

It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.³ The holdings of the cases

F.Cas. 353 (W.D.Ark.1878) ("[p]etitioner was born of white parents, had left his domicile in the Indian country and gained domicile in the state of Kansas."); 2 Op.Atty.Gen. 693 (1834) (Attorney General concludes that the Choctaw tribal courts have no jurisdiction over white citizens nor over Negro slaves owned by white citizens); *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113 (1970) (Solicitor General of the Department of Interior concludes that Indian tribes do not possess criminal jurisdiction over non-Indians).

3. A similar inconsistency pervades the opinions of this court. Compare, e.g. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g. *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal of-

cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

fenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

4. See Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

The comment only postulates that nonmember Indians and non-Indians be treated the

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. There are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). One commentator has implied that non-Indians and nonmembers have the same status. The implication was derived from an analysis of statutes that allow states to assume criminal and civil jurisdiction over Indian country with the consent of the tribe occupying the particular Indian country. 25 U.S.C. §§ 1321, 1322 and 1326. We do not agree with that implication.⁴

same. The comment acknowledges that changes in Indian treaty provisions in the 18th and early 19th centuries make Congress' intent uncertain on the issue of federal versus tribal criminal jurisdiction. These language changes might indicate, the comment suggests:

"[T]hat Congress meant to assume federal jurisdiction over offenses between nonmember Indians and tribal members in the same manner it had previously assumed federal jurisdiction over offenses between non-Indians and tribal members. On the other hand Congress may have intended the change of language to merely reflect the applicability of a treaty to only the signatory tribes." *Id.* at 738 (emphasis added).

At the same time the comment proposes that by examining treaty provisions, the intent of Congress to assume jurisdiction over nonmember Indians is made clear. Yet later the author, examining federal statutes (25 U.S.C. §§ 1321, 1322 and 1326) states that Indian and nonmember Indians can only be implicitly equated.

The problem is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area. Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations.

As for *Oliphant*, the comment acknowledged several times that it is limited to non-Indians.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.⁵ *Id.* at 206, 208, 98 S.Ct. at 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over nonmember Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim which we address later. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

Rather, what is more dispositive of this case is the federal criminal statutory scheme⁶ and its treatment of crimes committed by Indians. 18 U.S.C. § 1151, et seq.

[4] That statutory scheme subjects individuals to federal prosecution "by virtue of their status as Indians." *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977). For purposes of the federal criminal statutes the impor-

5. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

6. In addition to the statutory scheme, the regulatory scheme promulgated by the Department of Interior's Bureau of Indian Affairs establishing Courts of Indian Offenses states that those courts "shall have jurisdiction over all offenses ... when committed by any Indian, within the

tant inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in *United States v. Heath*, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. §§ 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation. The reason was the absence of a federal relationship between the Klamaths and the United States as a result of the termination of federal supervision over the Klamath Tribe by the Klamath Termination Act, 26 U.S.C. § 564 et seq. *Id.* at 19. Under 18 U.S.C. § 1153 jurisdiction is based upon a crime committed by one Indian against another Indian within the Indian country. It was not suggested that federal jurisdiction was lacking because the Klamath was on the reservation of the Warm Springs Tribe, where she enjoyed no tribal relationship.

Granted, the discussion so far has been concerned with federal jurisdiction and not tribal. However, it cannot be ignored that the two are interwoven. Thus in *Arizona ex rel Merrill v. Turtle*, *supra*, we held that Navajo tribal sovereignty precluded Arizona from arresting a Cheyenne Indian on the Navajo Reservation for the purpose of extraditing him to Oklahoma. We recognized, by analyzing the terms of the Treaty of 1868 between the Navajos and the United States that a tribe has the right to exercise power over the Indian residents of its reservation, without distinction as to

reservation or reservations for which the court is established ... 25 C.F.R. § 11.2(a) (1987) (emphasis added). We find it instructive that the regulations fail to limit jurisdiction of these courts only to offenses committed by Indians of the tribe for which the particular court is established. (The regulations deem an Indian, for purposes of these courts "to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 25 C.F.R. § 11.2(c) (1987). There is no distinction made as to the status of nonmember Indians.)

whether the Indian was a member of the tribe or not. *Id.* at 686.

The structure of criminal jurisdiction in Indian country, as far as it relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to that or some other tribe ... [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagame*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886) (emphasis added). The statute has never been restricted in its application to Indians who are members of the "host" tribe.

[5] Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under 18 U.S.C. § 1152. That statute makes applicable in Indian country those criminal laws applicable in areas of exclusive federal jurisdiction with several exceptions.⁷

As 18 U.S.C. § 1152 has been applied it has also been assumed that references to "Indian" meant any Indian not just Indians who were members of the host tribe. In *United States v. Burland*, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971) we applied the statute to a member of the Confederated Salish and Kootenai Tribes who committed a crime on the Flathead Reservation. We noted, citing *Kagame*, *supra*, that Bur-

7. The statute does not apply to offenses committed by one Indian against the person or property of another Indian, nor to an Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

8. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment

land did not argue "that the statute was inapplicable to him because he was a member of a tribe other than the local tribe and was visiting from another reservation." *Id.* at 1200, n. 1.

Furthermore, in discussing the Major Crimes Act, we held in *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980) that except for the crimes specifically enumerated in the Act, "the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country." *Id.* at 1231. Again we declined to make a distinction between member and nonmember Indians.

The cases discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.

B. Equal Protection

[6,7] The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.⁸ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict

limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv.L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

[8] The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."⁹ *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federal recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*, 417 U.S. 535, 553, n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

[9-12] The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509

F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), cert. denied, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[13] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that his is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

Pueblo v. Martinez, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

9. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra* note 8. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara*

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order to better enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs*, 98 Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nielson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently

from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959).

[14,15] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

[16] Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.¹⁰ See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. 14

10. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already

been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, Dissenting:

The majority has substantially revised its opinion since it first appeared at 821 F.2d 1358-64 (9th Cir.1987). It is, therefore, appropriate that my dissent be revised, particularly in light of the fact that the intervening deliberations have provided to me additional insights that have strengthened my resolve to dissent.

In my original dissent, I stated "*Oliphant* should govern this case." *Id.* at 1364. That remains true, but now I am more ready to concede that it need not. The underpinning of its holding was the history of the relationship between the United States and Indian tribes generally and the Suquamish Tribe in particular.

Emphasis was placed upon the fact that the tribes seldom, if ever, exercised criminal jurisdiction over non-Indians prior to the middle of this century. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97, 98 S.Ct. 1011, 1014-15, 55 L.Ed.2d 209 (1978). The same undoubtedly cannot be said with respect to the exercise of criminal jurisdiction over Indians not members of the adjudicating tribe. Therefore, I concede that the *ratio decidendi* of *Oliphant* is not applicable to this case.

Nonetheless, *Oliphant* exists. Its holding that neither the existing residual tribal sovereignty nor a grant of power by Congress authorized the exercise of criminal jurisdiction by a tribe over a non-Indian leaves open the question whether either supports the exercise of such jurisdiction over a nonmember Indian. I believe neither does. My reasons, succinctly stated, are as follows:

(1) *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), makes clear that retained tribal sovereignty exists to govern the behavior of tribal members. No necessity exists to expand its reach.

(2) No federal statute explicitly grants to tribal authorities the power to exercise criminal jurisdiction over nonmembers. 18 U.S.C. § 1152 does not exclude such a grant but it does not require it. Nor does existing case law require it.

(3) To subject nonmember Indians to tribal jurisdiction discriminates against the nonmember both actually and potentially. This discrimination is not justifiable.

I now shall address each of these positions in greater depth.

I.

RETAINED TRIBAL SOVEREIGNTY

To understand the scope of *United States v. Wheeler*, *supra*, it is helpful to point out that both *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Wheeler* originated in this circuit and that each constituted a reversal of this circuit's prior decision. In *Oliphant*, this circuit extended

criminal tribal jurisdiction to non-Indians, while in *Wheeler* it made any conviction by a tribal court of any crime over which it had jurisdiction a bar to prosecution by the United States of the greater offense of which the tribally prosecuted lesser included offense was a part. The circuit court in *Wheeler* undoubtedly was influenced by the expansion of tribal authority recognized by *Oliphant*. To reach its result in *Wheeler*, this court reasoned that the United States and the Navajo Tribe should not be treated as dual sovereigns for double jeopardy purposes.

It was this proposition against which much of the Supreme Court's opinion in *Wheeler* is directed. It must be remembered that the Court no doubt considered *Wheeler* and *Oliphant* contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided *Oliphant* by rejecting the expansion of the authority of tribal courts over crimes by non-Indians, it would not have been surprising to have found the Court in *Wheeler* using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in *Wheeler*. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its members. Two examples of this focus are as follows:

Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that

part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 [94 S.Ct. 772, 777-778]; *Johnson v. McIntosh*, 8 Wheat. 543, 574 [5 L.Ed. 681]. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559 [8 L.Ed. 483]; *Cherokee Nation v. Georgia*, 5 Pet., at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 [8 L.Ed. 162] (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant v. Suquamish Indian Tribe*, ante, [435 U.S.] p. 191 [98 S.Ct. p. 1011].

435 U.S. at 326, 98 S.Ct. at 1087 (emphasis added).

In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. at 1088 (emphasis added) (footnotes omitted). Others appear in the margin.¹

1. It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people with the power of regulating their internal and social relations." *United States v. Kagame*, *supra*, 118 U.S. at 381-382, 6 S.Ct. at 1112-1113; *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 80 L.Ed. 25. Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions. *United States v. Antelope*, 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395,

1397 n. 2; *Talton v. Mayes*, 163 U.S. 376, 380, 16 S.Ct. 986, 988, 41 L.Ed. 196; *Ex parte Crow Dog*, 109 U.S. 556, 571-572, 3 S.Ct. 396, 405-406, 27 L.Ed. 1030 (1883); see 18 U.S.C. § 1152 (1976 ed.), *infra*, n. 21.

435 U.S. at 322, 98 S.Ct. at 1085 (emphasis added) (footnote omitted).

The Indian tribes are "distinct political communities" with their own mores and laws. *Worcester v. Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means.

The lesson to be drawn appears to me to be clear. Retained tribal sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate. The upshot is that the majority wishes to enhance slightly tribal powers while I do not.

II.

DO FEDERAL STATUTES GRANT TO TRIBES POWER TO IMPOSE CRIMINAL PUNISHMENT ON NONMEMBER INDIANS?

The majority devotes substantial space to arguing that federal statutes have given tribal courts the power to subject nonmember Indians to its criminal jurisdiction. See pp. 12-16 [Brunetti draft]. It asserts that certain cases have assumed that such jurisdiction exists and that "the structure of criminal jurisdiction in Indian country," p. 14[B.d.], also suggests that this is true.

I shall address each case cited by the majority. Only a portion of a sentence appearing in *United States v. Antelope*, 430 U.S. 61, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977), was quoted by the ma-

They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U.S. at 571 [3 S.Ct. at 405].

Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. *Id.* at 331-32, 98 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

jority, apparently to make the point that federal criminal statutes focus on "Indians" without the qualifier "tribal member" or "non-tribal member." The full sentence is:

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

The "circumstances of this case" were that members of the Coeur d'Alene tribe murdered a non-Indian in the Coeur d'Alene reservation and sought to be tried under Idaho law rather than federal law pursuant to the Major Crimes Act, 18 U.S.C. § 1153. The Court rejected the defendants' constitutional argument. It was not necessary to address whether any distinction between members of the Coeur d'Alene tribe and nonmembers existed. To have said each time the word "Indians" was used, "including both members and nonmembers," would have been absurd. The case simply is not relevant to the issue before us.

The majority itself recognized the marginal significance of *United States v. Heath*, 509 F.2d 16 (9th Cir.1974), to the issue before us. I would go further and assert that it has no relevance whatsoever. The issues before the court in *Heath* were whether the United States could indict an Indian of a terminated tribe under the Major Crimes Act, 18 U.S.C. § 1153, and, if

2. 18 U.S.C. § 1153 reads in relevant part as follows:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

not, whether the attempt to do so was prejudicial error when the crime charged was murder, as defined in 18 U.S.C. § 1111, and committed in "Indian country" and, thus, subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. § 1152.³ This court held that the defendant, as an Indian of a terminated tribe, must be treated as any other non-Indian citizen of the state. As a result, 18 U.S.C. § 1153 could not provide a basis for federal jurisdiction. It applies, this court held, only when the "Indian who commits [certain crimes] against the person or property of another Indian or other person," § 1153, is an Indian as to whom the United States has a "special responsibility." *Heath*, 509 F.2d at 19. A person, who happens to be an Indian and was once a member of a now terminated tribe, could have been indicted, as could have been any other person, under 18 U.S.C. § 1152. The court concluded that under these circumstances the indictment under 18 U.S.C. § 1153 was not prejudicial error.

The issue of tribal court jurisdiction over a nonmember Indian was irrelevant to the question that *Heath* raised. Had the *Heath* court believed that the tribal court had criminal jurisdiction over a nonmember it would have affected neither its reasoning nor its result. The crucial issue, as seen by *Heath*, was whether the United States had a "special responsibility" with regard to the defendant, not whether the defendant was a member of the victim's tribe. The majority says it did not occur to the *Heath* court to suggest "that federal jurisdiction is lacking because the Klamath [the defendant Indian] was on the reservation of the Warm Springs Tribe, where he enjoyed no tribal relationship." [B draft p. 3] Of course, it did not. It was irrelevant. To overlook an issue that could have been controlling is significant; to refrain from addressing one that is irrelevant only mer-

3. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person

cifully saves both the reader's eyes and time.

The majority's use of *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970), is a bit closer to the mark at which it is shooting. Unfortunately, a miss is a miss, however. This court, in holding that the Navajo Tribe need not accede to Arizona's effort to extradite a Cheyenne Indian resident on their reservation to the State of Oklahoma, emphasized the retained sovereignty of the Tribe. We pointed to the Treaty of 1868, the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the codification of the Navajo Tribe's extradition responsibilities in its Tribal Code, and the approval of that Code by the Commissioner of Indian Affairs. None of those sources of law required the Tribe to accede to Arizona's request. Indeed, the Tribal Code expressly precluded any such accession.

The case, therefore, is consistent with the existence of substantial retained sovereignty and for the purposes of the case treated members and nonmembers the same. This similarity of treatment was rooted in the 1868 Treaty that spoke of "bad men among the Indians," who committed wrongs against anyone "subject to the authority of the United States," a group that undoubtedly includes, from time to time, whites as well as nonmember Indians. But it goes no further. It simply does not address the jurisdiction of the Navajo Tribe to subject nonmembers to criminal prosecution. If one repeats "tribal sovereignty" over and over again, the hypnotic power of the phrase may lead one to conclude that such jurisdiction in a given situation exists. Reasoning, not self-hypnosis, is the way of the law, however.

or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

11 U.S.C. § 1152.

Enough has been said to suggest that neither 18 U.S.C. § 1152 nor 18 U.S.C. § 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

The Federal Enclaves Act, 18 U.S.C. § 1152, also does not unequivocally support the majority. Its principal purpose is to extend to "Indian country" the general laws of the United States. The reach of those laws within "Indian country" clearly is unaffected by whether the offender is an Indian or a non-Indian. See *Mull v. United States*, 402 F.2d 571, 573 (9th Cir.1968), cert. denied, 393 U.S. 1107, 89 S.Ct. 917, 21 L.Ed.2d 804 (1969). On its face, 18 U.S.C. § 1152 also would appear not to draw a distinction between a victim who is Indian and one who is not. However, it has been long established that the statute does not embrace an offense by a non-Indian against a non-Indian even when committed in Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 869, 26 L.Ed. 869 (1882); see *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Mull v. United States*, 402 F.2d at 573.

An offense by an Indian against a non-Indian, on the other hand, is within the statute. See *United States v. Burland*, 441 F.2d 1199, 1203 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971). And it is true, as *Burland* holds, that the Indian offender need not have committed his crime within the reservation limits of the tribe of which he is a member. Cf. *United States v. Kagama*, 118 U.S. 375, 382, 6 S.Ct. 1109, 1113, 30 L.Ed. 228, 231 (1885). All that is necessary is that it have been committed in "Indian country."

4. And possibly on state prosecutors if, as has been suggested by some, "victimless" crimes by non-Indians (and nonmember Indians by the

The position of the majority emerges in its most forceful form when the focus is fixed upon the exceptions to 18 U.S.C. § 1152. These are (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," and (3) any offense where by treaty exclusive jurisdiction "is or may be secured to the Indian tribes respectively." Only the first would be affected by taking *Wheeler* at its word and rejecting the position of the majority. In essence, the majority argues that because there is no explicit provision for relieving the nonmember Indian from tribal jurisdiction in the first exception, he must be subject to the tribe's criminal jurisdiction. It buttresses this by pointing out, as already indicated, that 18 U.S.C. § 1152 is applicable generally without regard to whether the offender was a member of the Tribe on whose reservation the offense was committed. Thus, tribal membership, it argues, also should be irrelevant in applying the exception.

The conclusion does not follow. To disregard membership in construing the broad reach of 18 U.S.C. § 1152 protects Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to enhance the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist. Finally, there is no more reason to treat the literal language of the statute as all encompassing than there was in the case of the non-Indian offenses against the non-Indian. See *McBratney*, 104 U.S. 869; *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307.

I acknowledge that the exclusion of nonmember Indians from the jurisdiction of tribal courts will impose somewhat greater responsibilities on certain United States Attorneys.⁴ Nonmember offenses not directed at another Indian, and not described in the Major Crimes Act, 11 U.S.C. § 1163, must be prosecuted by these officials.

reasoning of the dissent) fall within the exclusive jurisdiction of state courts. See 3 Op. Off. Legal Counsel 111 (1979).

This category embraces such things as drunk and disorderly conduct.

The majority also suggests that state prosecutors and state courts may become involved in law enforcement. This concern appears to be premised on the assumption that an offense by a nonmember Indian against another Indian, which is not a major crime, would not be covered by 18 U.S.C. § 1152 were my view to prevail. Thus, the majority suggests state law enforcement would be required to fill the gap.

I suggest the majority has misread 18 U.S.C. § 1152. To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently. To the extent the offense each commits is not proscribed by federal law, the Assimilative Crimes Act, 18 U.S.C. § 13, will import the applicable state law to be applied by federal authorities and courts.

The fear of the majority can be put this way. As they see it, an offense which is not a major one by an Indian against an Indian is excluded from federal jurisdiction when tribal jurisdiction is lacking because the offender is a nonmember. I suggest that under those circumstances the offense "escapes" the first exception to the general rule of 18 U.S.C. § 1152 but does not "escape" the broad reach of 18 U.S.C. § 1152. That is, the offense remains an offense by an Indian within Indian country and thus subject to the general laws of the United States, but, for the reason stated here, should not be considered as one committed by one Indian against another within the meaning of the first exception to 18 U.S.C. § 1152. Put more simply, the nonmember Indian should be treated as a non-Indian.

III.

DISCRIMINATION AGAINST THE NONMEMBER INDIAN

In my original dissent, I lumped all the discriminatory possibilities to which the

majority subjected the nonmember Indian under the heading of equal protection. The majority in its original and revised opinion addresses the equal protection issue and concludes that there is a rational basis for subjecting the nonmember to tribal jurisdiction and that, in any event, in this case *Duro* is not being discriminated against on the basis of race.

On reflection, I have concluded that it is not essential to my position to fit the facts of this case to the analytics of the equal protection doctrines. Rather, I have employed the discriminatory possibilities this case suggests to inform my interpretation of the applicable statutes and cases. These possibilities may, but need not, rise to the level of equal protection violations. Their existence suggests, however, that wise construction of the applicable law should reduce, if not eliminate, their existence.

The heart of the issue this case presents, as this dissent already has stated, is that the majority puts the offending nonmember Indian in a position different from, and less advantageous than, that of any other class of offender. The member Indian offender is "among his own," which presumably is frequently to his benefit. The non-Indian is protected by *Olipphant*, *supra*, from possibly harsh treatment by a tribal court animated by a bias against all non-Indians. And the Indian no longer enjoying the "special relationship" with the federal government enjoys the same protection as does the non-Indian. Only the nonmember Indian still enjoying that "special relationship" must be subject to a tribunal that, on its face, suggests the possibility of prejudice against him.

It is not beyond the pale of proper judicial behavior to employ an interpretation of the law that eliminates this possibility. In the final analysis, the majority has suggested only two rather weak reasons for not doing so, viz., to enhance tribal sovereignty and to avoid burdening U.S. Attorneys and their staffs. Inasmuch as the contribution to these ends made by the majority's approach is only marginal at

best, I would hold that the price demanded for these modest achievements is too high. Tribes would lose no meaningful sovereignty under my analysis nor would U.S. Attorneys become overburdened.

I respectfully dissent.



NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellant,

v.

Donald P. HODEL, Secretary of the Interior, et al., Defendants-Appellees,

Western Energy Co.; Wesco Resources, Inc.; and Thermal Energy, Inc.,
Defendants-Intervenors-Appellees.

No. 86-4389.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 10, 1987.

Decided March 15, 1988.

As Amended July 11, 1988.

Indian tribe sought to enjoin the Secretary of the Interior from proceeding with federal coal leases without complying with federal law. The United States District Court, District of Montana, James F. Battin, Chief District Judge, granted tribe summary judgment and issued injunction voiding leases as being in violation of the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of tribe. The Secretary moved to amend judgment and the District Court amended its injunction to suspend, rather than void, the leases. Tribe appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) the Secretary's motion gave the District Court power to amend the judgment; (2) finding that leases violated federal law did not mandate issuance of

injunction; (3) the District Court abused its discretion by failing to consider public interest before amending injunction; and (4) the District Court abused its discretion by failing to order the Secretary to comply with his own regulations concerning competitive leasing of federal coal rights.

Reversed and remanded with instructions.

Opinion superseded, 842 F.2d 224.

1. Federal Civil Procedure — 2643

Motion to alter or amend judgment gave district court power to amend judgment which had voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act, § 2 et seq., 30 U.S.C.A. § 201 et seq.

2. Federal Civil Procedure — 2658

Ten-day limitation contained in rule concerning motions to alter or amend judgments has to be strictly construed. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

3. Federal Civil Procedure — 2658

Motion for "modification of relief" filed by coal lessee was not motion to alter or amend judgment, and thus, was not subject to ten-day limitation; rather, motion was timely response to lessor's motion to amend judgment, which voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act § 2 et seq., 30 U.S.C.A. § 201 et seq.

F.2d 348 (8th Cir.1984), and *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir.1987), travel time must be compensated at the same hourly rate as other work. In *Craig*, however, we simply said that the district court's award of fees for travel time at the full rate was not unreasonable on the particular facts there before us. *Craig*, 738 F.2d at 850-51. And in *Rose* we said that the district court should "award fees at the full hourly rate ... unless it determine[d] in its discretion that such a recovery would be unreasonable." *Rose*, 816 F.2d at 396 (emphasis added). Neither case holds that fees for travel time must always be awarded at the full hourly rate. The District Court concluded that the rate for travel time should be lower in this case and we do not find that decision to run afoul of applicable law or to be unreasonable.

The order of the District Court is **AF-FIRMED**.



Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals,
Ninth Circuit.

Nov. 2, 1988.

Appeal from the United States District Court for the District of Arizona.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

ORDER

Judge Choy and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends accepting the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. Fed.R.App.P. 35(b). A majority of the judges voted against en banc consideration. Judge Kozinski's dissent from the order denying rehearing en banc is attached.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom LEAVY and TROTT, Circuit Judges, join, dissenting from the order denying rehearing en banc.

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," *Duro v. Reina*, 851 F.2d 1186, 1189 (9th Cir.1988), a panel of our court has cast off the map and the compass. The panel's holding—that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe—overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals. This is a serious matter deserving serious attention. I therefore respectfully dissent from the order denying rehearing en banc.

I

Petitioner Albert Duro is a member of the Torres-Martinez band of Mission Indians. From March 1984 to June 1984, Duro

lived on the Salt River Indian Reservation, the home of the Salt River Pima-Maricopa Indian Community, a tribe in which Duro is ineligible for membership. While on the Salt River Reservation, Duro allegedly shot and killed a fourteen year old boy. Criminal complaints against Duro were filed in both federal district court and the Salt River Pima-Maricopa Indian Community Court.

The panel holds that the tribal court has criminal jurisdiction over Duro, a member of a wholly different tribe, simply because he is an Indian. As discussed more fully below, this one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided.

II

A. Disregard of Supreme Court Authority

The panel laments the lack of Supreme Court guidance on the question before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labelling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has charted a clear course through these waters, a course that the Eighth Circuit had no difficulty

1. The panel correctly notes that *Oliphant* has been widely criticized. 851 F.2d at 1142 n. 5. See Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1987 Wis.L.Rev. 219, 267-74; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479 (1979); Barish & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn.L.Rev. 609 (1979). Yet *Oliphant* remains law and continues to be, at least in the Supreme Court's view, the progenitor of a series of tribal jurisdiction decisions. The panel may well be right in joining the chorus, 851 F.2d at 1141-42, but academic criticism, no matter how strong, cannot overrule a decision of the Supreme Court.

following. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988).

The course starts with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the Court held that tribes could not exercise criminal jurisdiction over non-Indians.¹ Standing alone, *Oliphant* leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians who are not members of the forum tribe. A series of subsequent decisions have elaborated on *Oliphant*, however, effectively foreclosing this possibility.

Only two weeks after *Oliphant* the Court decided *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 808 (1978). *Wheeler* raised the question whether the defendant (a member of the Navajo tribe) could be tried in federal court after the Navajo tribal court had convicted him for the same conduct. To resolve this question, the Supreme Court had to examine the source of the tribe's authority over *Wheeler*.² The Court concluded that the jurisdiction derived from the tribe's retained authority, i.e., that aspect of the tribe's sovereignty it had not given up by virtue of incorporation into the United States. In reaching this conclusion, the Court drew a sharp distinction between those sovereign powers the tribe had surrendered and those it had not:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the rela-

2. The source of the authority was crucial for double jeopardy purposes: If the tribe derived its authority from Congress, the defendant would face double jeopardy because both prosecutions would be on behalf of the same sovereign. See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937) (double jeopardy clause bars successive prosecutions by federal and territorial courts because they are "creations emanating from the same sovereignty"); *Waller v. Florida*, 397 U.S. 387, 393, 90 S.Ct. 1184, 1187, 25 L.Ed.2d 435 (1970) (barring successive prosecutions by a city and by the state of which the city is a political subdivision). If the sources were different (as in the case of separate state and federal prosecutions), then the double jeopardy clause would not bar subsequent prosecution by the United States. See *Wheeler*, 435 U.S. at 329-30, 98 S.Ct. at 1089-90.

tions between an Indian tribe and non-members of the tribe.... But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326, 98 S.Ct. at 1087 (emphasis added). Speaking precisely to the issue presented in our case, the Court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts." *Id.* (citing *Oliphant*, 435 U.S. at 191, 98 S.Ct. at 1011).

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort: It is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. More important, when cited by the Court in support of its analysis in *Wheeler*, it is the only characterization of *Oliphant* that makes sense. As the Eighth Circuit recognized, "[t]he *Wheeler* Court's analysis distinguishing nonmember Indians from tribal members was not inadvertent. Its very analysis requires such distinction." *Greywater*, 846 F.2d at 491. If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*.³

But *Oliphant* and *Wheeler* were only the first manifestations of the Court's emerging theory limiting tribal jurisdiction to members of the tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court con-

sidered whether a state could impose various state taxes on cigarettes and other items sold by tribal enterprises on the reservation. The Court held that the state could properly tax sales to nonmembers of the tribe, but not sales to members. Most important, the Court addressed the issue—crucial in our case—of the status of the Indians who were not members of the tribe in question:

[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.

Id. at 161 100 S.Ct. at 2085 (emphasis added); see also *id.* at 187, 100 S.Ct. at 2098 (Rehnquist, J., concurring in part) ("[t]he fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share"). Although the Court was discussing a tribe's immunity from taxation, not its criminal jurisdiction, the Court was clearly drawing on a broader theory of tribal sovereignty: A tribe acts as a sovereign only with respect to its own members.

3. The majority minimizes *Wheeler* by describing its use of the term "nonmember" as "indiscriminate." 851 F.2d at 1140. The fact that the Court refers to both nonmembers and non-Indians in some of its opinions does not, however, reveal sloppy thinking or the random use of language. When the Court merely describes the facts presented by *Oliphant* or other cases, it usually employs the term non-Indian. See, e.g., *Montana v. United States*, 450 U.S. 544, 565-66,

101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). When it discusses its rationale, the Court repeatedly distinguishes along the line of tribal membership and not race. See, e.g., *Montana*, 450 U.S. at 563-64, 101 S.Ct. at 1257-58; *Colville*, 447 U.S. at 155-61, 100 S.Ct. at 2082-83.

The panel disregards *Colville*, just as it disregards *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), where the Court provided its most explicit statement yet as to the boundaries of tribal sovereignty. *Montana* draws a clear distinction between a tribe's power over its own members and its power over nonmembers. At issue was whether a tribe could prohibit hunting and fishing by nonmembers on reservation land not owned by the tribe. Applying the principles announced in *Wheeler*, the Court concluded that the tribe could not prohibit such activities:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. at 1257 (emphasis added; citations omitted). Significantly, the Court viewed its conclusion as flowing

4. The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. The states already exercise exclusive jurisdiction over similar offenses (both violent and victimless) committed on the reservation involving solely non-Indian defendants and victims. See F. Cohen, *Handbook of Federal Indian Law* 352-53 & n. 47 (1982 ed.). The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. Any such disparate treatment would violate the equal protection clause of the fourteenth amendment, subjecting state officials to liability under 42 U.S.C. § 1983 (1982). See *Proctor v. Navaretta*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (state officials liable under section 1983 where they know or should know that their conduct violates a clearly established constitutional right); *Smith v. Rous*, 482 F.2d 33,

from the rationale of *Oliphant*: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S.Ct. at 1258 (emphasis added; footnote omitted). The exercise of criminal jurisdiction is plainly an "inherent sovereign power."

As the Eighth Circuit recognized, "in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate."

36 (6th Cir.1973) (per curiam) (law enforcement officers may be liable under section 1983 for failure to enforce the law equally and fairly); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to single out Indians in ways "that might otherwise be constitutionally offensive"). The panel cites no support for its proposition.

The far more plausible assumption is that states would exercise their jurisdiction fully and responsibly. Non-Indian residents of reservations apparently outnumber nonmember Indian residents by a substantial margin. Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc at 9-10; see *Greywater*, 846 F.2d at 493. The states would therefore experience only a marginal increase in law enforcement responsibilities on the reservation. Moreover, some tribes already restrict their own criminal jurisdiction to tribal members. See, e.g., *Quachan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 & n. 4 (9th Cir.1976) (declining to rule on whether the tribe has inherent power to assert criminal jurisdiction

B. Equal Protection

Another very troubling aspect of the panel's opinion is its handling of Duro's equal protection claim. Duro argues that, by asserting jurisdiction over Indians but not over non-Indians, the tribe has violated the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8) (1982 & Supp. IV 1986). While a distinction based solely on tribal membership could be sustained on a rational basis alone, Duro contends that the distinction in this case is based on race and does not survive strict scrutiny. The panel rejects this argument and, in doing so, makes two fundamental errors. First, the majority relies on cases holding that Congress need not have a compelling governmental interest in enacting statutes that discriminate between Indians and non-Indians in order to survive an equal protection challenge. See *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (federal jurisdiction over Indian defendants under Major Crimes Act, 18 U.S.C. § 1153); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (Bureau of Indian Affairs employment preference for enrolled Indians). These cases are inapposite where there is no congressional pronouncement on the issue and the tribe is exercising its retained sovereignty. Second, the panel holds that the classification in question is not racial at all because race is merely one of several factors that go into drawing the distinction at issue. This holding cannot be squared with established principles of equal protection.

The considerations that led the Court to uphold congressional Indian/non-Indian distinctions are irrelevant where, as here, Congress has not acted. The Constitution has been interpreted as granting Congress "plenary power . . . to deal with the special problems of Indians." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483; see *Antelope*, 430

over nonmembers because tribal constitution permits criminal jurisdiction only over members); Cohen, *supra* note 3, at 357 n. 77 ("[o]ther tribes have laws restricting tribal jurisdiction to members"). Presumably some authority steps in to fill the jurisdictional void created in such cases; the states are a logical

U.S. at 645, 97 S.Ct. at 1398; U.S. Const. art. I, § 8. Moreover, congressional enactments affording special treatment to Indian tribes and their members are based on a long "history of treaties and the assumption of a 'guardian-ward' status." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483. Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . ." *Antelope*, 430 U.S. at 646, 97 S.Ct. at 1399 (quoting *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24); see also *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484 (BIA preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Fisher v. District Court*, 424 U.S. 882, 390-91, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party).

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books. *Mancari*, 417 U.S. at 552, 94 S.Ct. at 2483; see *id.* at 555, 94 S.Ct. at 2485 (permitting special treatment of Indians so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

On the other hand, the Court has never held that a tribe may exercise its authority in a racially discriminatory manner. As the Court held in *Wheeler*, Indian tribes derive their power to conduct criminal tri-

choice. See *id.* at 357 n. 79 ("[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader"); *Greywater*, 846 F.2d at 490 n. 3 ("Petitioners were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident.").

als not from Congress but from their own retained sovereignty. The two are quite different. Indian tribes may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The panel's holding that they may is without precedent or authority.

More disturbing still, the panel holds that the distinction based on Indian status is not a racial classification because factors other than race are taken into account. 851 F.2d at 1144. While this may be true when the distinction is made by Congress, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977). Either race was considered in the decision, in which case strict scrutiny is invoked, or race was not considered, in which case the rational basis standard applies. You can't have it both ways. In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. *See id.* (racially dis-

3. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) suggested that, because tribes are sovereigns pre-existing the Constitution, they may be exempt from constitutional provisions (such as the fifth and fourteenth amendments) limiting the power of federal and state authorities. The equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(b), however, extends to any person within a tribe's jurisdiction. While ICRA's equal protection clause may not be coextensive with the constitutional equal pro-

tection clause, *Houder v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir.1976); *Woundad Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir.1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n. 9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

C. Potential for Biased Tribunals

There is yet another troubling aspect of the opinion: its failure to address or even consider the possibility that it may be subjecting Duro to adjudication by a biased tribunal. Judge Sneed, in dissent, gave the subject thoughtful attention. 851 F.2d at 1151-52 (Sneed, J., dissenting). The *Grywater* panel thought the matter significant enough to merit discussion:

As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Grywater, 848 F.2d at 493. The *Duro* majority ignores the subject.

Indian tribes differ in material respects from political entities to which we are accustomed. They have broad authority to

section clause, *Houder v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir.1976); *Woundad Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir.1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n. 9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

determine the qualifications for membership, which often are based on degree of tribal blood. Cohen, *supra* note 5, at 20-23. To be eligible for membership in the Salt River Pima-Maricopa Indian Community, a person must not be a member of another tribe. Salt River Pima-Maricopa Community Const. art. II, § 1; Salt River Pima-Maricopa Community Code § 2-1(a) (Supp. No. 2). As noted, Duro is thus ineligible for membership in the community which will decide his fate. The exclusion of otherwise eligible individuals who belong to another tribe underscores the possibility that those who do not qualify for tribal membership may be treated in an unfair or discriminatory fashion. Indeed, the possibility that there may be hostility or mistrust between Indian tribes is not a far-fetched concern. As reported in testimony given recently before the Civil Rights Commission, at least one such situation currently exists, giving rise to what many perceive as miscarriages of justice:

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute....

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court.... It is my personal experience that these individuals have experienced a violation of their ... right to trial by impartial jury....

I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of

an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.

... Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land.... [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed....

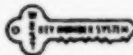
Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights (Aug. 13-14, 1987) at 219-20 (testimony of Lee Brook Phillips, attorney).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

III

Despite warnings from Judge Sneed's powerful and persuasive dissent, despite the unanimous decision of another circuit, the court today stands by a panel opinion that simply does not do justice to the sensi-

tive and important issues presented to us.
I respectfully dissent.



Jimmy NEUSCHAFER,
Petitioner-Appellant,

v.

Harol WHITLEY; Attorney General for
the State of Nevada,
Respondents-Appellees.

No. 88-1688.

United States Court of Appeals,
Ninth Circuit.

Argued Feb. 29, 1988.

Submitted May 6, 1988.

Decided Nov. 3, 1988.

State prisoner sought habeas corpus. The United States District Court for the District of Nevada, Edward C. Reed, Jr., Chief Judge, 674 F.Supp. 1418, dismissed and petitioner appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that petitioner's claim that he did not assert some of his claims in his first federal petition because they were unexhausted precluded a finding that he deliberately withheld those claims from his first federal petition and thereby abused the writ when he brought a second petition asserting those claims.

Reversed and remanded.

Chambers, Circuit Judge, filed a concurring opinion.

Alarcon, Circuit Judge, filed an opinion concurring in the result.

1. Habeas Corpus ¶=87

When petitioner has not exhausted his state remedies before filing a federal habeas petition, district court may hold that federal petition in abeyance, issue a stay of

execution, and allow the petitioner an opportunity to exhaust his state remedies. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

2. Habeas Corpus ¶=113(12)

District court's decision to deny consideration on the merits of a petition for habeas corpus because it is abusive or successive is reviewed for abuse of discretion. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

3. Habeas Corpus ¶=7

"Abusive" habeas corpus petition raises grounds that were available but not raised in an earlier petition, whereas a "successive" petition raises grounds identical to those in a prior petition; there are different standards that determine when a court may dismiss a petition as abusive and when it may dismiss one as successive. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ¶=7

Court abuses its discretion when it bases its decision to dismiss a habeas corpus petition as abusive or successive on an erroneous legal conclusion or on a clearly erroneous finding of fact. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

5. Habeas Corpus ¶=7

Federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner made a conscious decision deliberately to withhold them from a prior petition, is pursuing needlessly piecemeal litigation, or has raised claims only to vex, harass, or delay. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially

JUL 6 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ALBERT DURO,*Petitioner,*

v.

EDWARD REINA, Chief of Police, Salt River Department of
Public Safety, Salt River Pima-Maricopa Indian Com-
munity; and the HON. RELMAN R. MANUEL, SR., Chief
Judge of the Salt River Pima-Maricopa Indian Com-
munity Court,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 31, 1989
CERTIORARI GRANTED APRIL 24, 1989

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RELEVANT DOCKET ENTRIES

DATE FILED	DOCUMENT
November 8, 1984	Verified Petition for a Writ of Habeas Corpus And/or For A Writ of Prohibition; Petitioner's Application to Proceed <i>In Forma Pauperis</i>
November 8, 1984	Petitioner's Motion for a Preliminary Injunction
November 9, 1984	Order Granting Application to Proceed <i>In Forma Pauperis</i>
November 9, 1984	Order to Show Cause Issued by Hon. William P. Copple Setting A Hearing on November 20, 1984
November 19, 1984	Stipulation of fact executed by Counsel for both parties
November 16, 184	Stipulation to ContinueOrder to Show Cause Hearing
November 16, 1984	Order Continuing Hearing From November 20, 1984 to November 23, 1984
November 21, 1984	Respondents' Memorandum of Law in support of asserting tribal Court jurisdiction over non-member Indians
November 20, 1984	Order Appointing John Trebon, Asst. Federal Public Defender, to represent Albert Duro
November 22, 1984	Petitioner's Memorandum of Law In Support of Motion for Preliminary Injunction
December 5, 1984	Petitioner's Memorandum of Law in Support of his verified petition asserting lack of tribal Court jurisdiction over Albert Durio, a Cahuli Indian

DATE FILED	DOCUMENT
November 23, 1984	Hearing on Preliminary Injunction Held. The Hearing was Continued Until Further Order of the Court and Briefing Schedule Established
December 12, 1984	Respondent's Reply Memorandum to Petitioner's Memorandum of Law
January 8, 1985	Memorandum and Order of the Hon. William P. Copple
January 13, 1985	Judgment of the District Court
February 11, 1985	Respondents' Notice of Appeal
February 20, 1985	District Court's Issuance of Certificate of Probable Cause

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 84-2107PHX WPC

ALBERT DURO,
Petitioner,

-vs-

EDWARD REINA, Chief of Police, Salt River Department of Public Safety (of the Salt River Pima-Maricopa Indian Community); and the HONORABLE RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

VERIFIED PETITION FOR A WRIT OF HABEAS
CORPUS AND/OR FOR A WRIT OF PROHIBITION

Filed November 8, 1984

ALBERT DURO petitions this Court for a Writ of Habeas Corpus and/or Writ of Prohibition against Respondents.

I. *The Parties.*

1. The petitioner, Albert Duro, is a citizen of the United States. He was born in Riverside, California and is a permanent resident of the State of California. His date of birth is 6/17/58.

2. Albert Duro is not a member of, nor is he eligible for membership in, the Salt River Pima-Maricopa Indian

Community. Membership within the Salt River Pima-Maricopa Indian Community is governed by Article II of its' Constitution and Chapter Two (Sections 2-1 through 2-5) of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, all of which is attached to this Petition and incorporated by reference as Exhibit A.

3. The Salt River Department of Public Safety is the police agency of and for the Salt River Pima-Maricopa Indian Community, which exists on and extends its authority over the Salt River Indian Reservation.

4. Edward Reina is the Chief of Police or chief officer of the Salt River Department of Public Safety. He has immediate custody over Albert Duro.

5. The Honorable Relman R. Manuel, Sr., is the Chief Judge of the Salt River Pima-Maricopa Indian Community Court.

6. The Salt River Indian Reservation was established by Executive Order dated June 14, 1879, which amended an earlier order of January 10, 1879. It established a reservation for the Pima and Maricopa Indians. The Executive Order of June 14, 1879, relating to the Salt River Indian Reservation and subsequent amendments thereto are attached to this petition and incorporated by reference as Exhibit B.

7. The Constitution and Code of the Salt River Pima-Maricopa Indian Community was promulgated under the authority of the Indian Reorganization Act. See Title 25 United States Code § 476. Upon information and belief, no treaties exist between the United States and the Indians of the Salt River Community.

II. *Jurisdiction.*

This Court has jurisdiction over the persons and subject matter of this action pursuant to:

Article I, Section 8, Clause 3 of the United States Constitution;

Article I, Section 9, Clause 2 of the United States Constitution;

Title 28 U.S.C. Sections 2241(c)(1) and (3);

Title 25 U.S.C. Section 1303.

The Court is authorized to issue a writ of prohibition pursuant to Title 28 U.S.C. § 1651.

III. *The Facts.*

On or about the 19th day of June, 1984, Albert Duro was arrested near his home in the State of California by federal agents and charged with murder. He was subsequently removed to the District of Arizona and appeared before Magistrate Sitver on July 2, 1984. The "Criminal Complaint" filed against Albert Duro and Wendel Lackey is attached to this petition and incorporated by reference as Exhibit C.

8. The Grand Jury within the District of Arizona returned an indictment against Albert Duro on or about July 25, 1984, charging him with first degree murder in the death of Phillip Fernando Brown. The indictment is attached to this Petition and incorporated by reference as Exhibit D. It alleges that Albert Duro killed Phillip Fernando Brown within the confines of the "Pima-Salt River Indian Community, Indian Country" by means of a firearm on or about June 15, 1984.

9. Upon motion of the U.S. Government, the indictment against Albert Duro was dismissed without prejudice by order of the Honorable William P. Copple, Judge of the U.S. District Court, on September 17, 1984. The Order of Dismissal is attached to this Petition and incorporated by reference as Exhibit E. At the time of dismissal, the government indicated that it intended to reindict Mr. Duro after further investigation was completed.

10. The U.S. Marshal caused Mr. Duro to be held in custody after the dismissal of the indictment against him so that he could be turned over to the custody of tribal authorities for the Salt River Pima-Maricopa Indian Community. On September 19, 1984, Mr. Duro was placed in the custody of the Salt River Department of Public Safety and continues to be held by them within the confines of the Salt River Indian Reservation.

11. A "Criminal Complaint" against Albert Duro charging him with "Discharge of Firearms" was filed with the Salt River Pima-Maricopa Indian Community Court, dated June 18, 1984 (C.R. 84-0256). The complaint is attached to this petition and incorporated by reference as Exhibit F. The Salt River Pima-Maricopa Indian Community essentially charges that Albert Duro "discharged at least two (2) shots from a lever action rifle in the Victory Acres Area I" of the Reservation and that one of the shots killed a "14 year old boy". The criminal complaint (Exhibit D) and the federal indictment (Exhibit B) relate precisely to the same incident. The use or discharge of a firearm charged in both cases relates to the same act(s).

12. Phillip Fernando Brown, the "14 year old boy" named in the federal indictment (Exhibit D) and referred to in the criminal complaint of the tribe (Exhibit F) is an enrolled member of the Gila River Indian Tribe, which resides on a reservation separate and apart from the Salt River Indian Reservation. The certification of Indian blood relating to Phillip Fernando Brown is attached to this petition and incorporated by reference as Exhibit G.

13. A "Motion to dismiss" was filed with the tribal court in behalf of Albert Duro on October 4, 1984. The motion specifically argued that the Salt River Pima-Maricopa Indian Community Court did not have jurisdiction over Albert Duro, who is not a member of the Salt

River Pima-Maricopa Indian Community. The Motion to Dismiss is attached to this petition and incorporated by reference as Exhibit H. The question of jurisdiction raised by the Motion to Dismiss was premised upon federal, rather than tribal law.

14. The "Prosecutor for the Salt River Pima-Maricopa Indian Community" filed an "Answer to Motion to Dismiss" on or about October 12, 1984, which is attached to this petition and incorporated by reference as Exhibit I. The Answer to Motion to Dismiss essentially relied upon federal, rather than tribal law to support its ultimate conclusion with respect to jurisdiction.

15. Counsel for both parties argued the Motion to Dismiss before the Salt River Pima-Maricopa Indian Community Court on October 15, 1984. No evidence was presented by either party.

16. The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over "any person otherwise subject to the jurisdiction of the Salt River Court." See Section 4-1(c) of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit J.

17. The Honorable Relman R. Manuel, Sr., Chief Judge of the Salt River Pima-Maricopa Indian Community Court, issued a "Ruling on Motion to Dismiss" on October 19, 1984, which is attached to this petition and incorporated by reference as Exhibit K. The ruling denied Mr. Duro's Motion to Dismiss.

18. A trial date is now set on the charge against Mr. Duro in the Salt River Pima-Maricopa Indian Community Court for November 15, 1984. Mr. Duro remains in custody at this time.

19. The tribal court's ruling on Mr. Duro's motion to dismiss can not be appealed within the judicial structure

of the Salt River Pima-Maricopa Community Court. The Code of Ordinances of the Salt River Pima-Maricopa Indian Community affords a right to appeal only to a criminal "defendant found guilty in a criminal action." See Section 4-32 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit L.

20. The appellate division of the Salt River Pima-Maricopa Indian Community Court has no regular, judicial members. Appellate judges are appointed on each occasion that an appeal is taken from a decision of the Salt River Community Court. See Section 4-31 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit M. The appellate judges are appointed by the Chief Judge, the Honorable Relman R. Manuel, Sr.

21. As a nonmember of the Salt River Pima-Maricopa Indian Community, Albert Duro is not entitled to vote in tribal elections or hold elected office. See Sections 3-1 and 3-2 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which are attached to this petition and incorporated by reference as Exhibit N.

22. As a nonmember of the Salt River Pima-Maricopa Indian Community, Albert Duro is not, nor are any members of his ethnic class or background, eligible to sit on a jury within the Salt River Pima-Maricopa Indian Community Court. See Section 5-40 of the code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit O.

23. Marriages within the Salt River Pima-Maricopa Indian Community are recognized only in accordance with state (Arizona) laws. Common-law marriages are not

recognized unless they occurred prior to December 27, 1957. See Sections 10-11 and 10-12 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which are attached to this petition and incorporated by reference as Exhibit P.

24. No evidence was offered or admitted before the Salt River Pima-Maricopa Indian Community Court to establish that Albert duro is a member of the Torrez-Martinez band of Mission Indians or that he is an Indian as defined by the laws of the United States.

25. Mr. Duro has not previously applied for a writ of habeas corpus or other writ in this or any other court.

26. Mr. Duro continues to suffer irreparable harm due to his illegal incarceration and will suffer irreparable injury in the event that he is tried by the Salt River Pima-Maricopa Indian Community Court in violation of the Constitution and laws of the United States.

IV. *Legal Claims.*

A. *Count I—Criminal Jurisdiction.*

27. The Salt River Pima-Maricopa Indian Community Court does not have jurisdiction over Albert Duro in the criminal case previously described, Cause Number 84-0256.

28. The detention of Albert Duro by the Salt River Department of Public Safety upon the authority of the Salt River Pima-Maricopa Community Court is illegal and violative of the Constitution and laws of the United States. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

B. *Count II—Equal Protection.*

29. The Respondents have asserted that the Salt River Pima-Maricopa Indian Community Court has jurisdiction

over Albert Duro in this matter because he is a non-member Indian on the Salt River Indian Reservation. Assuming for purposes of this claim that Albert Duro is a nonmember Indian or that he is a member of the Torrez-Martinez band of Mission Indians, it is Mr. Duro's position that the tribal court still did not have jurisdiction over him in this matter.

30. The detention and trial of Albert Duro by the Salt River Pima-Maricopa Indian Community violates his right to equal protection of the law, in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution and/or the Indian Civil Rights Act, Title 25 U.S.C. Section 1302(8).

C. Count III—Due Process.

31. The detention of Albert Duro by the Salt River Department of Public Safety and the failure to grant his motion to dismiss (Exhibit H) by the Salt River Pima-Maricopa Indian Community Court under the circumstances previously described violates his right to due process of law under the Fifth Amendment to the United States Constitution and/or the provisions of the Indian Civil Rights Act, Title 25 U.S.C. Section 1302(8).

V. Relief Requested.

As a result, Mr. Duro requests this Court to issue a writ of habeas corpus and/or writ of prohibition commanding the respondents to produce Mr. Duro before this Court, at a time and place to be specified by this Court, so that this Court may further inquire into the lawfulness of respondents' custody of Mr. Duro; to discharge Mr. Duro from respondents' custody; to restrain or prohibit the respondents from further criminal prosecution against Mr. Duro; and to grant Mr. Duro such

other and further relief to which he may be entitled in this proceeding.

Dated this 7th day of November, 1984.

/s/ Albert Duro
ALBERT DURO
Petitioner

/s/ John Trebon
JOHN TREBON
Attorney for Petitioner
Albert Duro

(Affidavit Omitted in Printing)

EXHIBIT A

[Subpart A]

CONSTITUTION

Art. I. Territory

Art. II. Membership, §§ 1—3

Art. III. Legislative Branch, §§ 1—11

Art. IV. Vacancies and Removal from Office, §§ 1-3

ARTICLE I. TERRITORY

The jurisdiction of the Salt River Pima-Maricopa Indian Community shall extend to all lands within the boundaries of the Salt River Pima-Maricopa Indian Community established pursuant to the Act of February 28, 1859 (11 Stat. 401), and Executive Orders, to such other lands as may in the future be added thereto and to all land which from time to time be owned by the Salt River Pima-Maricopa Indian Community.

ARTICLE II. MEMBERSHIP

Sec. 1. Acquisition of membership.

The membership of the Salt River Pima-Maricopa Indian Community shall consist of:

- (a) All persons of Indian blood whose names appear, or rightfully should appear, on the official allotment roll of the Salt River Reservation shall be members of the Salt River Pima-Maricopa Indian Community.
- (b) All descendants of members of the Salt River Pima-Maricopa Indian Community if they are of at least one-fourth ($\frac{1}{4}$) degree Indian blood and are not members of any other Indian tribes. Descendants possessing less than one-fourth ($\frac{1}{4}$) de-

gree Indian blood may be admitted to membership by a majority vote of the community council.

- (c) Such other persons as the community council may see fit to admit to membership under rules of uniform application, provided no person may be admitted to membership unless he is a United States citizen and is a direct descendant of a member of the Salt River Pima-Maricopa Indian Community or is married to a member and has at least one-fourth ($\frac{1}{4}$) degree Indian blood of a recognized Indian tribe.
- (d) No decree of an outside court determining membership in the Salt River Pima-Maricopa Indian Community shall be recognized by the Salt River Pima-Maricopa Indian Community for membership purposes. All questions relating to the paternity of an applicant for enrollment shall be decided by the tribal court and the decision of the court shall be final.

Sec. 2. Future membership.

The community council shall have the power to pass ordinances subject to approval by the Secretary of the Interior or his authorized representative governing future membership, and the adoption of members by the Salt River Pima-Maricopa Indian Community.

Sec. 3. Membership roll.

The community council shall provide for the establishment and maintenance of an up-to-date roll of members of the Salt River Pima-Maricopa Indian Community and shall provide a fair hearing to any claimant to membership aggrieved by the omission or deletion of his name from such roll.

Chapter 2

COMMUNITY MEMBERSHIP*

Sec. 2-1. Membership as a matter of right.

(a) *Criteria.* Any person who is a descendant of a member of the Salt River Pima-Maricopa Indian Community and has at least one-fourth degree Indian blood, who is not a member of any other Indian tribe or community, and who is a citizen of the United States, is a member of the Salt River Pima-Maricopa Indian Community and shall be enrolled as a member upon filing with the official designated by the Salt River Pima-Maricopa Indian Community Council:

- (1) Evidence or affidavit of nonmembership in any other Indian community or tribe, or the relinquishment of the same;
- (2) Proof of descendancy by birth certificate or otherwise;
- (3) Affidavit of degree of Indian blood evidencing at least one-fourth degree of Indian blood; and
- (4) Evidence of United States citizenship.

(b) *Notification.* Any person filing the documents provided for herein shall be notified within two (2) working days of the filing if the documents filed are determined by the designated official to be insufficient. Notification shall be in writing deposited in the U.S. mails by certified mail; in which case the notification time ends at the time of mailing, or by personal delivery to the person who has

* Editor's note—The user of this code should be aware that Ord. No. SRO-82-83, adopted Nov. 17, 1982, which establishes procedures within the planning and land management department for assuring that the tribal role is properly managed, is in effect, but has not been set out at length herein. Copies of the ordinance are on file in the office of the secretary of the community.

filed. Any person receiving such notice, mailed or delivered within the allowed time, may, within seven (7) days after actual receipt, apply to the Salt River Pima-Maricopa Indian Community Council for a review of the decision. The review procedure will be that established by section 2-2(b)(2). (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.1; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-2. Admittance to membership at discretion of community council.

(a) *Eligibility.*

- (1) *Descendant of member.* Any person who has less than one-fourth degree Indian blood may become a member of the Salt River Pima-Maricopa Indian Community upon the filing of a proper application and upon a determination by the Salt River Pima-Maricopa Indian Community Council that the applicant is a descendant of a member of the Salt River Pima-Maricopa Indian Community and not a member of any other recognized Indian tribe or community, is of good moral character and is a citizen of the United States.
- (2) *Married to member.* Any person who is not a descendant of a member of the Salt River Pima-Maricopa Indian Community may become a member of the Salt River Pima-Maricopa Indian Community upon the filing of a proper application and upon a determination by the Salt River Pima-Maricopa Indian Community Council that the applicant is married to a member of the Salt River Pima-Maricopa Indian Community, has at least one-fourth degree Indian blood of a recognized Indian tribe, is not a member of any other recognized Indian tribe or community, is of good moral character and is a citizen of the United States.

(b) *Application Procedure.*

- (1) *Granting of application.* Any applicant for membership under this section shall apply in writing to the official designated by the Salt River Pima-Maricopa Indian Community Council. The application shall include one or more affidavits which attest to the good moral character of the applicant, and such other documents as are necessary to prove the facts required under subsection (a) (1) or (2) of this section. The community council may make or cause to be made such inquiry to ascertain the facts as it deems necessary to make its decision. Within thirty (30) days after filing such application, the Salt River Pima-Maricopa Indian Community Council shall decide whether the application should be granted. The decision of the council shall be communicated in writing to the applicant by certified mail or personal service within three (3) days after the decision has been made.
- (2) *Council review of denied applications.* Any applicant aggrieved by the decision of the Salt River Pima-Maricopa Indian Community Council may, within seven (7) days after service of the decision has been made, apply for a hearing before the Salt River Pima-Maricopa Indian Community Council for a review of the decision. Such a review shall take place within fourteen (14) days of the filing of the application for review. The decision made by the Salt River Pima-Maricopa Indian Community Council on review shall be made within five (5) days after the date of the review hearing. The aggrieved applicant may at the time of the hearing present witnesses to show his qualifications. The community council may allow other witnesses to testify. Notice of the decision of the community council shall be given to the applicant by certified

mail or personal service within five (5) days after the decision on review has been made.

(c) *Action Upon Grant of Application.* If the community council grants an application for membership, the applicant's name shall be placed upon the roll of members of the Salt River Pima-Maricopa Indian Community.

(d) *Review by Court.* No court shall have jurisdiction to review any decision of the community council made pursuant to this chapter, except that all questions relating to the paternity of an applicant for enrollment shall be decided by the community court and the decision of the community court shall be final. (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.2; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-3. Removal from membership rolls.

Upon a petition duly executed by a member of the Salt River Pima-Maricopa Indian Community requesting that the petitioner's name be deleted from the rolls of the Salt River Pima-Maricopa Indian Community, the Salt River Pima-Maricopa Indian Community Council shall direct the proper official or employee of the Salt River Pima-Maricopa Indian Community to delete the petitioner's name from the rolls of the Salt River Pima-Maricopa Indian Community. Upon such deletion, the petitioner shall no longer be a member of the Salt River Pima-Maricopa Indian Community. (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.3; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-4. Removal of trespassers.

All persons hunting, fishing, cutting wood, driving livestock, peddling, or doing any commercial business on a trust Indian allotment without the permission of the owner or on community land in this community, without the permission of the Salt River Pima-Maricopa Indian Community Council may be prosecuted under community law, forcibly ejected from the community by a police

officer, officer of the United States Indian Service or community officer, and/or may be turned over to the custody of the United States marshal or sheriff or other officer of the State of Arizona for prosecution under federal or state law. (Code 1976, § 7.11)

Cross reference—Hunting and fishing licenses, §§ 15-11, 15-12.

Sec. 2-5. Removal of nonmember lawbreakers.

Any person not a member of the Salt River Pima-Maricopa Indian Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community by any police officer, officer of the United States Indian Service or community police officer, and or may be turned over to the custody of the United States marshal or sheriff or other officer of the State of Arizona for prosecution under federal or state law. (Code 1976, § 7.12)

Cross reference—Extradition, Ch. 7.

EXHIBIT B

THE WHITE HOUSE, *July 31, 1911.*

It is hereby ordered that the following-described lands in Pinal County, Arizona, be, and they are hereby, reserved from settlement, entry, sale, or other disposal, and set aside as an addition to the Gila River Indian Reservation, Arizona, subject to any valid existing rights of any persons thereo:

Township 5 south, range 7 east. Gila and Salt River meridian: Section 1, lots 5, 6, 7, 8, 9, and 10, SW $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the west 160 acres of the SE. $\frac{1}{4}$ of section 1. Section 12, E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NW. $\frac{3}{4}$ of SE. $\frac{1}{4}$, and lots 2, 3, 4, and 9.

Township 5 south, range 8 east, Gila and Salt River meridian: Section 6, lots 6 and 7, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, S. $\frac{1}{2}$ of SE. $\frac{1}{4}$. Section 7, lot 1, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$.

WM. H. TAFT.

THE WHITE HOUSE, *December 16, 1911.*

Under authority of the act of Congress approved June 25, 1910 (36 Stat., 847), and on the recommendation of the Secretary of the Interior, it is hereby ordered that all of township 5 south, range 7, east, Gila and Salt River meridian, Arizona, except such portions thereof as have been heretofore reserved and set aside as an addition to the Gila River Indian Reservation, be temporarily withdrawn from settlement, location, sale, or entry, except as provided in said act, and be reserved for classification.

WM. H. TAFT.

SALT RIVER RESERVATION

EXECUTIVE MANSION, *June 14, 1879.*

In lieu of an Executive order dated January 10, 1879, setting apart certain lands in the Territory of Arizona as a reservation for the Pima and Maricopa Indians, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale and settlement, and set apart for the use of said Pima and Maricopa Indians, as an addition to the reservation set apart for said Indians by act of Congress approved February 28, 1859 (11 Stat., 401), the several tracts of country in said Territory of Arizona lying within the following boundaries, viz:

Beginning at the point where the range line between ranges 4 and 5 east crosses the Salt River; thence up and along the middle of said river to a point where the easterly line of Camp McDowell Military Reservation, if prolonged south, would strike said river; thence northerly to the southeast corner of Camp McDowell Reservation; thence west along the southern boundary line of said Camp McDowell Reservation to the southwest corner thereof; thence up and along the west boundary line of said reservation until it intersects the north boundary of the southern tier of sections in township 3 north, range 6 east; thence west along the north boundary of the southern tier of sections in townships 3 north, ranges 5 and 6 east, to the northwest corner of section 31, township 3 north, range 5 east; thence south along the range line between ranges 4 and 5 east to the place of beginning.

Also all the land in said Territory bounded and described as follows, viz:

Beginning at the northwest corner of the old Gila Reservation; thence by a direct line running northwesterly until it strikes Salt River 4 miles east from the intersection of said river with the Gila River; thence down and along the middle of said Salt River to the mouth of

the Gila River; thence up and along the middle of said Gila River to its intersection with the northwesterly boundary line of the old Gila Reservation; thence northwesterly along said last-described boundary line to the place of beginning.

It is hereby ordered that so much of townships 1 and 2 north, ranges 5 and 6 east, lying south of the Salt River, as are now occupied and improved by said Indians, be temporarily withdrawn from sale and settlement until such time as they may severally dispose of and receive payment for the improvements made by them on said lands.

R. B. HAYES.

THE WHITE HOUSE, *October 20, 1910.*

It is hereby ordered that the following described land in the State of Arizona, viz. all of sections 1 and 12 in township 1 north, range 4 east of the Gila and Salt River meridian, be, and the same are hereby, withdrawn from settlement, entry, and sale, and set apart as an addition to the Salt River Indian Reservation: *Provided*, That nothing herein shall affect any existing valid rights of any person to the lands described.

WM. H. TAFT.

THE WHITE HOUSE, *March 22, 1911.*

It is hereby ordered that Executive order of June 14, 1879, creating a reservation for use of the "Pima and Maricopa Indians," be, and the same is hereby, amended so as to make said reservation available for use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

WM. H. TAFT.

THE WHITE HOUSE, *September 28, 1911.*

Executive order of June 14, 1879, temporarily withdrawing from sale and settlement for Indian uses so much of townships 1 and 2 north, ranges 5 and 6 east, in Arizona, lying south of the Salt River, is hereby amended so as to permanently withdraw from settlement, entry, sale, or other disposition all those tracts lying south of the Salt River in sections 25, 26, 34, and 36, except the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 34, in township 2 north, range 5 east, of the Gila and Salt River meridian, for the use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon, subject to any existing valid rights of any persons thereto.

WM. H. TAFT.

THE WHITE HOUSE, *October 23, 1911.*

Executive order of June 14, 1879, temporarily withdrawing from sale and settlement for Indian uses all of townships 1 and 2 north, ranges 5 and 6 east, in Arizona, lying south of the Salt River, is hereby amended so as to withdraw permanently from settlement, entry, sale, or other disposition all that part of section 35 in township 2 north, range 5 of the Gila and Salt River meridian, lying south of the Salt River, for use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon, subject to any existing valid rights of any persons thereto.

WM. H. TAFT.

EXHIBIT C

CRIMINAL COMPLAINT
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Magistrate's Case No. 84-5125M

UNITED STATES OF AMERICA

v.

ALBERT ROBERT DURO, and WENDEL LACKEY

Complaint for violation of Title 18,
United States Code § 1153 and 1111 and 2

Morton Sitver, U.S. Magistrate, Phoenix, AZ

Date of Offense

6/15/85

Place of Offense

Victory Acres #1
Salt River Indian Res

Address of Accused (if known)

Duro—Unknown
Lackey—Unknown

Complainant's Statement of Facts Constituting the Offense or Violation:

On or about the 15th day of June, 1984, in the District of Arizona, within the confines of the Salt River Indian Reservation, Indian Country, ALBERT ROBERT DURO and WENDEL LACKEY, Indians, did murder, and aid and abet the murder of, PHILLIP FERNANDO BROWN, an Indian, in violation of Title 18 United States Code, Sections 1153, 1111, and 2.

Basis of Complainants Charge Against the Accused:

SEE ATTACHED

Complaint Authorized by AUSA John D. Lyons, Jr.
Recommended Bond: \$50,000

Material Witnesses in Relation to this Charge:

Sisto Ramirez, Carl Standing Elk, S/A L. Bruce Atkins, S/A Mark S. Bullock

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.

/s/ L. Bruce Atkins
Complainant
S/A FBI

Sworn to before me and subscribed in my presence,

/s/ Morton Sitver
Complainant
Magistrate

6/18/84

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No.: CR 84-235 PHX

VIO: 18 U.S.C. §§ 1153, 1111 and
2 (CIR-Murder-1st Degree)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALBERT ROBERT DURO and WENDEL LACKEY,
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

On or about the 15th day of June, 1984, in the District of Arizona, and within the confines of the Pima-Salt River Indian Community, Indian Country, ALBERT ROBERT DURO and WENDEL LACKEY, Indians, with premeditation and malice aforethought and by means of a firearm did murder and aid and abet the murder of Phillip Fernando Brown, an Indian.

In violation of Title 18, United States Code, Section 1153, 1111 and 2.

A TRUE BILL

/s/ Davis L. Green
Foreman of the Grand Jury
July 25, 1984

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR-84-235-PHX-WPC

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALBERT ROBERT DURO and WENDEL LACKEY,
Defendants.

DISMISSAL OF INDICTMENT

The United States of America, pursuant to Rule 48, *F.R.Cr.P.*, with leave of the court being granted, dismisses the Indictment without prejudice against Albert Duro and Wendel Lackey.

Respectfully submitted this 17th day of September, 1984.

A. MELVIN McDONALD
United States Attorney
District of Arizona

/s/ Roger W. Dokken
ROGER W. DOKKEN
Assistant U.S. Attorney

Copy of the foregoing hand-delivered this 17th day of September, 1984, to:

John Trebon
Assistant Federal Public Defender
United States Courthouse, Room 5000
230 North First Avenue
Phoenix, Arizona 85025
Attorney for defendant Duro

/s/ Roger W. Dokken
ROGER W. DOKKEN
Assistant U.S. Attorney

ORDER

Leave of the court is granted for the United States to dismiss the Indictment without prejudice in the above-captioned case.

DATED this 17 day of September, 1984.

/s/ [Illegible]
United States District Judge

EXHIBIT F

[LOGO]

SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY COURT
SCOTTSDALE, ARIZONA

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

VS

ALBERT DURO,

Defendant

CRIMINAL COMPLAINT

The above defendant is charged by this complaint with the offense of Discharge of Firearms, which is in violation of Section 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Community to wit: The said defendant did on or about the 18th day of June, 1984, at about 10:30 P.M., and before the signing of this complaint, within the boundaries of the Salt River Indian Reservation: Albert Duro discharged at least (2) shots from a lever action rifle in the Victory Acres I residential zone. One of the shots struck and wounded a 14 year old boy who was riding his bicycle nearby. This boy subsequently died as a result of the wound.

Against the peace and dignity of the Salt River Pima-Maricopa Indian Community.

Witnesses: /s/ [Illegible]

Authority: Ch. I, Section 1

Date 6-18-84

EXHIBIT G

GILA RIVER INDIAN COMMUNITY
SACATON, AZ. 85247

[LOGO]

Tribal Enrollment
Administrative Offices
P.O. Box 87—(602) 562-3311

CERTIFICATION OF INDIAN BLOOD
(REGULAR IDENTIFICATION)

Dear Mr. Andrews:

I HEREBY CERTIFY THAT: Phillip Fernando Brown
DATE OF BIRTH: February 1, 1970 IS AN EN-
ROLLED MEMBER OF THE GILA RIVER PIMA/
MARICOPA TRIBE, WITH GRID. #: 13,917 AND IS:
15/16 DEGREE OF: Pima-Maricopa-Klamath INDIAN
BLOOD.

June 21, 1984
DATE:

/s/ Marti Manuel
SIGNATURE

Enrollment Coordinator
TITLE:

EXHIBIT H

IN THE TRIBAL COURT OF THE SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff,

-vs-

ALBERT DURO,
Defendant.

MOTION TO DISMISS

ALBERT DURO, by and through his attorney, requests that this Court enter an order dismissing all pending criminal charges against him. The request is based upon the fact that this Court does not have criminal jurisdiction over the person of Albert Duro, who is not a member of the Salt River Pima-Maricopa Indian Community.

MEMORANDUM

I. *Introduction.*

A complaint against Albert Duro dated June 18, 1984, charges him with illegal discharge of a firearm in violation of § 6-131 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community (hereinafter referred to as the Salt River Community). The illegal discharge allegedly occurred within the reservation boundaries of the Salt River Community on June 15, 1984.

It is also well known that the local charges against Mr. Duro began to proceed in tribal court only after federal.

homicide charges against him were dismissed.¹ Upon information and belief, Mr. Duro was held in the Maricopa County Jail upon request of the U.S. Marshal's Office after federal charges were dismissed so that he could be turned over to the Salt River Community.

According to reports disclosed by the prosecution, many of the participants in the incidents of June 15, 1984, are tribal members of either the Salt River Community or the Gila River Indian Community. No such claim is made with respect to Albert Duro. In fact, he is not either a member or eligible for membership in the Salt River Community. See Article II, Section I of the Constitution of the Salt River Community; and Section 2 (pages 181-182) of the Salt River Community Code.

Criminal jurisdiction of the Salt River Community is formally asserted over "any person otherwise subject to the jurisdiction of the Salt River Court." Section 4-1(c) (pages 301-302) of the Salt River Code. Albert Duro respectfully submits that, as a non-tribal member, this Court does not have personal jurisdiction over him for purposes of the pending criminal charge. He requests dismissal of all charges and immediate release.

II. *Criminal Jurisdiction of the Salt River Community.*

The landmark decision of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), was one of the first to hold that tribal courts could not validly exercise criminal jurisdiction over non-tribal members, in spite of the fact that criminal misconduct allegedly occurred within the recognized boundaries of the Indian tribe. The issue in *Oliphant* was clearly drawn. The Saquamish tribal government adopted a Law and Order Code in 1973 which expressly exerted

¹ Federal prosecution in Arizona extended from July 2, 1984, to September 17, 1984. Mr. Duro was arrested in California prior to July 2, 1984.

criminal jurisdiction over both Indians and non-Indians. *Id.* at 193. Tribal authorities had arrested and charged Mark Oliphant for assaulting a tribal officer and resisting arrest on the reservation. Moreover, Oliphant was a resident of the Post Madison Reservation at the time of his arrest. *Id.* at 194. Nevertheless, the Supreme Court declared that the Suquamish tribal court could not exercise criminal jurisdiction over Mr. Oliphant.

Since the defendant was a white person, the Supreme Court merely decided in *Oliphant* that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, unless authorized by Congress to do so. The Court reasoned that Indian tribes, as a diminished "quasi-sovereign", continue to retain only those powers not "inconsistent with their status". *Id.* at 208. The power to determine the liberty of its citizens ultimately rests with the United States. *Id.* at 210. Quoting from an earlier decision, the Court recognized that the "limitation" upon the sovereignty of Indian tribes "amounts to the right of governing every person within their limits except themselves." 435 U.S. 191, at 209 (original emphasis). In other words, after incorporation into the United States, Indian tribes retained only the right of internal self-government, including criminal jurisdiction over its own members. *Oliphant v. Suquamish Indian Tribe, supra.*

The teachings of *Oliphant* have been reaffirmed by later decision of the Supreme Court, which explicitly refer to the power of tribal governments (relating to criminal jurisdiction) in terms of "tribal membership".²

² Tribal governments continue to retain civil jurisdiction and the power to tax as attributes of a "quasi-sovereign" as well. For instance, Indian tribes may tax cigarette purchases that occur within the boundaries of the reservation to non-tribal members. *Washington v. Confederated Tribes of the Coville Indian Reservation*, 447 U.S. 133, 152-154 (1980). On the other hand, state governments may tax similar purchases to nonmembers even though

It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions (cites omitted; emphasis added).

United States v. Wheeler, 435 U.S. 313, 322 (1978).

Thus, although the *Wheeler* court held that both the Navajo tribe and the United States, as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo reservation, the tribe could do so only because Wheeler was a tribal member. The meaning of *Oliphant* was accordingly clarified.

Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat,

sales took place on the reservation. *Id.* at 154-157. In the same vein, tribes retain power to impose its building, health and safety regulations on non-tribal members who own business on the reservation, *Cardin v. De La Cruz*, (9th Cir. 1982), and may prohibit or regulate hunting or fishing by nonmembers on tribal land. *Montana v. United States*, 450 U.S. 544 (1981). It is important to distinguish the retention of civil jurisdiction as opposed to criminal jurisdiction. Only the latter is involved in this case.

543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pct. 515, 559; *Cherokee Nation v. Georgia*, 5 Pct. at 17-18; *Fletcher v. Peek*, 6 Cranch 87, 147 (Johnson, J. concurring), and, as we have recently held, *they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978).

It is important to note that the decision of the Supreme Court in *Wheeler* was unanimous. The limit of tribal, criminal jurisdiction under *Wheeler* to members of the tribe has been repeatedly emphasized. See *Washington v. Confederated Tribes of the Coville Indian Reservation*, 447 U.S. 134, 152 (1979). The powers of Indian self-government, "including the power to prescribe and enforce internal criminal laws . . ." extend "only [to] relations among *members of a tribe*." (Emphasis added). *Montana v. United States*, 450 U.S. 544, 564 (1980). It follows that Albert Duro, as a non-tribal member, can not be prosecuted by the Salt River Community. The charges against him must be dismissed for lack of jurisdiction over his person.³

³ It is also easy to recognize that Albert Duro and his particular ethnic group is expressly excluded from participation in political, governmental, or judicial affairs of the Salt River Community.

As noted previously, Mr. Duro is not eligible for tribal membership. He cannot vote in elections of the Salt River Community or hold office. Art. II, Section 1 of the Constitution of the Salt River Community; Section 3-1 and 3-2 (pages 235-37) of the Salt River Community Code. He nor any member of his class is eligible to sit on a jury within the Salt River Community. Section 5-40 (pages 379-80) of the Salt River Community Code. In sum, it would be unfair to exert criminal jurisdiction over Albert Duro, while, at the same time, the Salt River Community has expressly excluded him and his own people from participation in all tribal affairs.

Respectfully submitted: October 2, 1984.

FREDRIC F. KAY
Federal Public Defender

/s/ John Trebon
JOHN TREBON
Asst. Federal Public Defender

[Filed October 4, 1984]

(Certificate Omitted in Printing)

EXHIBIT I

IN THE TRIBAL COURT OF THE
SALT RIVER PIMA-MARICOPA INDIAN TRIBES
MARICOPA COUNTY, STATE OF ARIZONA

CR-84-0256

SALT RIVER INDIAN COMMUNITY

Plaintiff

vs.

ALBERT DURO

Defendant

ANSWER TO MOTION TO DISMISS

COMES NOW Faithe C. Seota, Prosecutor for the Salt River Pima-Maricopa Indian Community and motions the honorable court to deny the motion to dismiss based on the following:

I

That this is a court of competent jurisdiction by virtue of section 4-1 of the Salt River Pima-Maricopa Indian Community Law and Order Code entitled Jurisdiction, subsection (c) entitled *Criminal Jurisdiction over persons*, subsection (1) and (2) address themselves to the extent over which the Salt River Pima-Maricopa Indian Community has and does exercise its jurisdiction. Subsection (2) particularly addresses itself to this issue:

"Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the Community Court."

QUESTION: WHAT DOES "any person otherwise subject to the jurisdiction of the Salt River Court" mean?

For all intents and purposes basing the answer to that question on the Supreme Court decision of *Oliphant v. The Suquamish Indian Tribe* 435 U.S. 191 (1978). The Supreme Court held that Indian Tribes do not have criminal jurisdiction over non-Indians.

"By submitting to the overriding sovereignty of the United States Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Oliphant v. The Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)

QUESTION: Is Albert Duro an non-Indian?

First what is an Indian? Indian "... for legal purposes in a definition of Indian as a purpose meeting two qualifications: (a) that some of the individuals ancestors lived in what is now the United States before it's discovery by Europeans, and (b) that the individual is recognized as a Indian by his for her tribe or community." (Cohen Felix, *Handbook of Federal Indian Law* (1982, p 20). The Torres-Martinez Band of Mission Indian (Cahuilla) is a federally recognized tribe of which Dr. Duro is a member since the band is federally recognized it would be safe to assume that Mr. Duro meets the preceeding qualifications of an Indian. By process of elimination the Court in Salt River does not exercise criminal jurisdiction over non-Indians. Since Mr. Duro is not a non-Indian this court has lawful jurisdiction over his person. Counsel Trebon alludes to the idea that this court also lacks jurisdiction over Mr. Duro because the federal court dismissed charges against the defendant.

"Major Crimes Act 18 U.S.C. Section 1153 places exclusive jurisdiction in this case involving unenumerated Indian against Indian offenses in Tribal Court. The government argues that jurisdiction lies

concurrently in tribal and federal courts." *United States v. Blue* No. 82-1995 (8th Cir., Dec. 1, 1983.). *United States v. Wheeler* 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. ed 303 says:

"The conclusion that an Indian tribe's power to punish tribal offenders is part of it's own retained sovereignty is clearly reflected in a case decided by this court more than 80 years ago, *Talton v. Mayes*, 163 U.S. 376."

It is important to note that none of the Supreme Court cases cited by the defendant deal with the question of whether a tribe may prosecute a member of another federally recognized Indian tribe for violation of it's criminal ordinances. There arises the question of whether the aspect of sovereignty, the right to try a member of another federally recognized Indian tribe for violation of a tribe's criminal ordinances has been "withdrawn . . . by implication as a necessary result of . . . their independent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) No reason has been given by the defendant that would compel the conclusion that such a withdrawal of such sovereignty has occurred. Mr. Duro's relationship with this community and it's members and work places is such that Albert Duro had and has within his grasp the possibility of being included as a member of the Salt River Pima-Maricopa Indian Community. He was not of a "particular ethnic group . . . expressly excluded . . ." (page 6 note 3 of Motion to Dismiss). As a member of a federally recognized tribe living in a "common law" relationship with a member of the Salt River Pima-Maricopa Indian Community, he was two steps from membership—marriage and application and approval by the Community Counsel. Article II, Section 1 (c), *Constitution and By-Laws of the Salt River Pima-Maricopa Indian Community*.

WHEREFORE the Prosecution respectfully requests that this Court deny the defendant's Motion to Dismiss.

SUBMITTED this 12th day of October, 1984

/s/ Faithe C. Seota
FAITHE C. SEOTA
Prosecutor

(Certificate Omitted in Printing)

EXHIBIT J

Chapter 4

COURTS GENERALLY *

Art. I. In General, §§ 4-1—4-20

Art. II. Judges, §§ 4-21—4-30

Art. III. Appeals, §§ 4-31—4-40

Art. IV. Rules of Court, §§ 4-41—4-43

ARTICLE I. IN GENERAL

Sec. 4-1.—Jurisdiction.

(a) *Court of original and appellate jurisdiction.* The Salt River Pima-Maricopa Indian Community Court is the court of original and appellate jurisdiction within the Salt River Pima-Maricopa Indian Community.

(b) *Subject matter jurisdiction limited by council action.* The Salt River Court shall have jurisdiction in all cases involving disputes in contract or tort and shall determine such cases upon the customary law of the Salt River Pima-Maricopa Indian Community as may be augmented by the common law as understood in the State of Arizona to the extent that the court requires, in order to do substantial justice to the parties in the dispute. In all other respects the jurisdiction of the Salt River Pima-Maricopa Indian Community Court is limited to the subject matter of those causes, disputes and prosecutions which the Salt River Pima-Maricopa Indian Community Council by enactment accords to the court.

(c) *Criminal jurisdiction over persons.*

(1) The court of the Salt River Pima-Maricopa Indian Community shall have jurisdiction over all offenses

* Cross references—Probate, Ch. 9; domestic relations, Ch. 10; juvenile code, Ch. 11.

enumerated in the Code of Ordinances when committed by any person otherwise subject to the jurisdiction of the Salt River Court.

- (2) Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the community court.
- (3) The Salt River Pima-Maricopa Indian Community shall be taken to include all territory within the reservation boundaries, including fee-patented lands, rights-of-way, roads, water, bridges and land used for schools, churches or agency purposes.

* * * *

EXHIBIT K

Salt River

PIMA-MARICOPA INDIAN COMMUNITY COURT
SCOTTSDALE, ARIZONA

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

-vs-

ALBERT DURO

Defendant

RULING ON MOTION TO DISMISS

This matter having come before the above-entitled Court on this 15th day of October, 1984 on a Motion to Dismiss, with the prosecutor, FAITHE SEOTA and defendant, ALBERT DURO with counsel, JOHN TREBON being present and ready to proceed.

The complainant alleges that ALBERT DURO, defendant committed the offense of Discharge of Firearms which is in violation of section 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Indian Community, in that the said defendant did on or about the 15th day of June, 1984, at about 10:30 P.M., within the boundaries of the Salt River Indian Reservation to wit:

ALBERT DURO discharged at least (2) shots from a lever action rifle in the Victory Acres I residential zone. One of the shots struck and wounded a 14 year old boy who was riding his bicycle nearby. This boy subsequently died as a result of the wound.

The motion to dismiss argues that this Court has no jurisdiction over the person of the defendant, ALBERT DURO. The basis of this argument is that the defendant is a non-member of this community, the defendants counsel states that:

"Criminal jurisdiction of the Salt River Community is formally asserted over "any person otherwise subject to the jurisdiction of the Salt River Court." Section 4-1(c) (pages 301-302) of the Salt River Code. Albert Duro respectfully submits that, as a non-tribal member, this Court does not have personal jurisdiction over him for purposes of the pending criminal charge. He requests dismissal of all charges and immediate release."

The prosecution argues and motions for the Court to deny the motion to dismiss on the following basis:

"That this is a court of competent jurisdiction by virtue of section 4-1 of the Salt River Pima-Maricopa Indian Community Law and Order Code entitled Jurisdiction, subsection (c) entitled Criminal Jurisdiction over Persons. Subsection (1) and (2) address themselves to the extent over which the Salt River Pima-Maricopa Indian Community has and does exercise it's jurisdiction. Subsection (2) particularly addresses itself to this issue:

"Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the Community Court."

The defendant sets forth the cases of OLIPHANT v. SUQUAMISH INDIAN TRIBE, 435 U.S. 191 (1978) and UNITED STATES v. WHEELER, 435 U.S. 313, 322 (1978), as the basis for his assertion that this Court does not have jurisdiction over him. The defendant's counsel sets the following argument:

"In *Oliphant*, the defendant was a white person, the Supreme Court merely decided that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, unless authorized by Congress to do so. The Court reasoned that Indian tribes, as a diminished "quasi-sovereign", continue to retain only those powers not "inconsistent with their status." *Id.* at 208. The power to determine the liberty of its' citizens ultimately rests with the United States. *Id.* at 210. Quoting from an earlier decision, the Court recognized that the "limitation" upon the sovereignty of Indian tribes "amounts to the right of governing every person within their limits except themselves." 435 U.S. 191, at 209 (original emphasis). In other words, after incorporation into the United States, Indian tribes retained only the right of internal self-government, including criminal jurisdiction over its own members. *Oliphant v. Suquamish Indian Tribe*, *supra*.

The teachings of *Oliphant* have been reaffirmed by later decisions of the Supreme Court, which explicitly refer to the power of tribal governments (relating to criminal jurisdiction) in terms of "tribal membership".

It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions (cites omitted; emphasis added).

United States v. Wheeler, 435 U.S. 313, 322 (1978).

Thus, although the *Wheeler* court held that both the Navajo tribe and the United States (sic), as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo reservation, the tribe could do so only because Wheeler was a tribal member. The meaning of *Oliphant* was accordingly clarified.

Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat, 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pct. 515, 559; *Cherokee Nation v. Georgia*, 5 Pct. at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 (Johnson J. concurring), and, as we have recently held, *they cannot try nonmembers in tribal courts*. *Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978)

In opposition to the defendants position the prosecution argues the following:

"It is important to note that none of the Supreme Court cases cited by the defendant deal with the question of whether a tribe may prosecute a member of another federally recognized Indian tribe for violation of its criminal ordinances. There arises the question of whether the aspect of sovereignty, the right to try a member of another federally recognized Indian tribe for violation of a tribe's criminal ordinances has been "withdrawn . . . by implication as

a necessary result of . . . their independent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) No reason has been given by the defendant that would compel the conclusion that such a withdrawal of such sovereignty has occurred."

With the Court having considered, the motion to dismiss, the answer to the motion and having reviewed the two primary cases cited, that of OLIPHANT and WHEELER, the Court now enters its opinion and ruling.

OPINION

Upon review of the OLIPHANT case, we find that the primary question before the Court at that time was whether Indian tribes had inherent criminal jurisdiction over non-Indians. The United States Supreme Court held and ruled that Indian tribes historically and traditionally did not have jurisdiction over non-Indians, absent any specific authority by Congress. The consistent language in this ruling has been in support of the rights of Indian tribes to control internal affairs. We quote from OLIPHANT:

"In *Ex parte Kenyon*, 14 Fed. cases 353 (WD ARK. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians, held that to give an Indian tribal "court jurisdiction of the person of an offender, such offender must be an Indian." *Id.*, at 355. The conclusion of Judge Parker was reaffirmed only recently in a 1970 Opinion of the Solicitor of the Department of the Interior. See 77 I.D. 113 (1970).

The Supreme Court viewed the history of criminal jurisdiction in Indian country as one of an attempt to protect the Indians from non-Indians and that this attempt to protect the Indians manifested itself in con-

gressional statutes establishing jurisdiction over non-Indians. Along with this attempt to protect the Indians, was also the object to allow "Indian nations criminal jurisdiction over Indians." Again we quote from OLIPHANT:

"In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield*, 141 U.S. 107, 115-116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the White population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

We now look at WHEELER, in which the defendant states supports his position as well as supporting or reaffirming OLIPHANT v. SUQUAMISH INDIAN TRIBE.

"Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the In-

dians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pct. 515, 559; *Cherokee Nation v. Georgia*, 5 Pct. at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 (Johnson, J. concurring). and, as we have recently held, *they cannot try non-members in tribal courts. Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978)

This particular section from the WHEELER case implies the loss of jurisdiction over non-members. But upon examination of the language, the divestiture of sovereignty exists only in external tribal matters and no loss of sovereignty exists over internal affairs, in both criminal and civil cases. With the High Court using the term "non-members" in reaffirming their holding in OLIPHANT v. SUQUAMISH INDIAN TRIBE, it can only be interpreted, that they use non-member and non-Indian as having the same meaning. This is the only interpretation possible in that the only question before the Court in OLIPHANT was whether the tribal court had jurisdiction over a non-Indian, the Court held, that the tribal court had no jurisdiction.

With this review of the two cases offered to support the defendants motion to dismiss, we find that they do not apply to the instant case, in OLIPHANT, the question was one of jurisdiction over non-Indians and in WHEELER the question of double jeopardy arose, when

the federal government, prosecuted after an Indian defendant was convicted in tribal court. While the Supreme Court in these two cases cited, addressed, the issue of member verses non-member it was never the primary issue, therefore there was no ruling on this question. The High Court has expressed implicitly that we have no jurisdiction over non-Indians, it has also stated that the Indian nations control their own internal affairs. Therefore we now have an issue before this Court, where we address this question of whether we have jurisdiction over a non-member. With all due consideration to the primary issues and the arguments we now enter the following ruling:

The question before the Court at this time is whether this Court has jurisdiction over the person of ALBERT DURO. Upon examination of the arguments presented, we have determined that MR. DURO does not fall within the category of being non-Indian and that as per Section 4-1(c) Criminal Jurisdiction over persons subsection (2) the defendant shall be deemed to have consented to the jurisdiction of the Community Court. Therefore, the motion to dismiss by the defendant is hereby denied and sets this case for trial.

IT IS SO ORDERED!

DONE this 19th day of October, 1984.

/s/ Relman R. Manuel Sr.
RELMAN R. MANUEL SR.
Chief Judge
Salt River Pima-Maricopa
Indian Community Court

[SEAL]

EXHIBIT L

ARTICLE III. APPEALS

Sec. 4-31. Appellate division.

The appellate division of the Salt River Pima-Maricopa Indian Community Court shall consist of two (2) judges of the Salt River Pima-Maricopa Indian Community Court appointed by the chief judge of the Salt River Pima-Maricopa Indian Court on each occasion that an appeal is taken from a decision of the Salt River Community Court. No judge shall sit on a court of appeals in a case in which the original proceedings were tried by that judge or if that judge was disqualified under section 4-26 of this Code. If otherwise qualified, the chief judge may be appointed to serve. (Amd. to Ord. No. SRO-33-75, § 1.9(a), 5-5-80)

Sec. 4-32. Right to appeal.

Any party aggrieved by the verdict or judgment in a civil action and any defendant found guilty in a criminal action may appeal from such verdict or judgment to the appellate division of the Salt River Community Court in accordance with the procedure provided in this Code. (Amd. to Ord. No. SRO-33-75, § 1.9(b), 5-5-80)

Sec. 4-33. Grounds for appeal.

The appellate division shall determine the appeal upon the findings of fact, conclusions of law and judgment entered in the case by the judge of the community court who presided at the trial or other final proceeding in the case.

- (a) *Findings of fact.* The findings of fact shall be presumed to be without reversible error. The presumption may be overcome by a sworn written statement presented to the court at the time of

the filing of the notice of appeal which establishes on the basis of the statement, any one or more of the following grounds:

- (1) That a witness ready and willing to testify at the time of the trial on behalf of the appellant was not allowed by the trial judge to take the witness stand and testify, and such testimony would have materially altered the judgment of the trial court.
- (2) That the trial judge refused to admit documentary or other physical evidence, and such evidence would have materially altered the judgment of the trial court.
- (3) That after the trial, the appellant discovered material evidence which, with reasonable diligence, could not have been discovered and produced at trial, and such evidence would have materially altered the judgment of the trial court.

In the event the appellate division finds the presumption is overcome pursuant to this subsection, the appellate division shall remand the case back to the trial court for the limited purpose of hearing only the excluded or new evidence and any evidence in rebuttal presented by the appellate to such evidence. At the conclusion of such remand hearing, the trial court shall, within ten (10) days of the hearings, make and enter such amended findings of fact, conclusions of law and judgment as the trial court deems necessary, or in the event the trial court determines that the evidence adduced at the remand hearing requires no amendment, the trial court will issue its order reaffirming its prior findings of fact, conclusions of law and judgment. The findings of fact, conclusions of law and judgment or order will be

transmitted to the appellate division and such findings of fact, conclusions of law and judgment or order will not be subject to a separate appeal.

- (b) *Conclusions of law.* The appellate division shall determine whether the conclusions of law are correct based on the findings of fact or amended findings of fact and whether the judgment is supported by the facts and the law. Any party to the case may request an opportunity to appear before the court prior to its decision to give the court such party's view of the case. The other party or parties shall be given adequate notice of the hearing and an opportunity to present such party's or parties' view of the case. Such views shall be presented orally by the parties and shall only deal with the ground relied on by the appellant as set out in the notice of appeal. The hearing shall be limited to one hour and the time will be equally divided between the parties. If the appellate division finds that the conclusions of law are incorrect and that the judgment is incorrect, or that the conclusions of law are correct and the judgment is incorrect, it shall issue a new judgment correctly stating the conclusions of law and judgment. Such judgment shall be a final judgment not subject to rehearing, review or appeal. The appellant shall prevail only if both judges of the appellate division agree that the appellant's position is correct. (Amd. to Ord. No. SRO-33-75, § 1.9(c), 5-5-80)

Sec. 4-34. Appeals procedure.

Appeals shall be taken from any judgment of the trial court in the following manner:

- (a) *Notice of appeal.* Written notice of appeal shall be given within five (5) days after the day written and executed judgment is entered with the

clerk or in the case of a criminal case, five (5) days after a written judgment and sentence is entered with the clerk. The notice of appeal shall state all the grounds for appeal relied on by the appellant. The notice of appeal shall not be amended once it is filed. The appellee may file a short written response to the grounds for appeal within ten (10) days after the notice of appeal is filed. The notice of appeal and response shall be mailed to the opposing party on the day it is filed.

- (b) *Court costs.* There shall be posted with the clerk of the court a cash fee of twenty-five dollars (\$25.00) to cover costs and disbursements.
- (c) *Criminal bond.* In a criminal case, the judge may require that a bond be posted not exceeding twice the amount of the fine imposed, or in the discretion of the judge, a cash bond of no more than twenty-five dollars (\$25.00) may be furnished in lieu thereof.
- (d) *Civil bond.* In a civil case, there shall be posted with the clerk of the court a bond equal to twice the amount of the judgment, including costs, when the judgment is for money, or twice the value of the property including costs, when the judgment is for the return of property. A cash deposit for the amount of the judgment or the value of the property, plus costs, may be made in lieu of a bond.
- (e) *Witness expenses.* The expenses of all witnesses subpoenaed by the appellant shall be paid by him and is not intended to be included in the twenty-five dollar (\$25.00) filing fee provided for in the foregoing. If the appellant is indigent, the fee or bond may be waived by the court. (Amd. to Ord. No. SRO-33-75, § 1.10, 5-5-80)

Secs. 4-45-4-40. Reserved.

EXHIBIT M

ARTICLE III. APPEALS

Sec. 4-31. Appellate division.

The appellate division of the Salt River Pima-Maricopa Indian Community Court shall consist of two (2) judges of the Salt River Pima-Maricopa Indian Community Court appointed by the chief judge of the Salt River Pima-Maricopa Indian Court on each occasion that an appeal is taken from a decision of the Salt River Community Court. No judge shall sit on a court of appeals on a case in which the original proceedings were tried by that judge or that judge was disqualified under section 4-26 of this Code. If otherwise qualified, the chief judge may be appointed to serve. (Amd. to Ord. No. SRO-33-75, § 1.9(a), 5-5-80)

Sec. 4-32. Right to appeal.

Any party aggrieved by the verdict or judgment in a civil action and any defendant found guilty in a criminal action may appeal from such verdict or judgment to the appellate division of the Salt River Community Court in accordance with the procedure provided in this Code. (Amd. to Ord. No. SRO-33-75, § 1.9(b), 5-5-80)

EXHIBIT N

Chapter 3

VOTING AND ELECTIONS

Sec. 3-1. Voters.

(a) *Registration.* The secretary of the community shall be the registrar of voters and shall be responsible for the registration of voters for any election. The places of registration shall be determined by the registrar subject to the provisions of this chapter. Any eligible members of the community may register to vote for any election at any place of registration up to twenty (20) days prior to such election, except that in the case of any special election for chief judge, any eligible member of the community may register to vote at any place of registration up to ten (10) days prior to such special election. The office of the secretary of the community shall be, during normal business hours, a place of registration during working days. Registration in that office which occurs subsequent to a date twenty (20) days prior to an election shall not be effective as to that election. The registrar shall within sixty-five (65) days before election day establish at least one additional place of registration in the Salt River District and one place of registration in the Lehi District. Such places of registration shall be open during the hours from 10:00 a.m. until 2:00 p.m. on the four (4) Saturdays prior to the twentieth day before election day. The registrar shall appoint such deputy registrars as necessary to assist the registrar in the exercise of his office.

(b) *Eligibility.* All members of the Salt River Pima-Maricopa Indian Community, as a membership is defined in Article II of the constitution and bylaws, who will have reached their eighteenth birthday by the day set for election, are eligible to vote in community elec-

tions. However, no person shall be permitted to vote unless his name appears on the list of registered voters of the district in which he proposed to vote. The name of each person who fails to vote at a community election after such person has registered to vote shall be removed from the list of registered voters. Any such person may again register to vote in subsequent elections.

(c) *Lists of registered voters.* A list of the registered voters in each district shall be prepared by the registrar or persons designated by her. The registered list for each district shall be presented to the judge of the election board of that district and a copy of the list shall be given to each member of the election board of that district and a copy shall be posted at each public place of posted notices at least fifteen (15) days prior to an election. Each election board shall review its registered list carefully, disqualify persons who have not registered for the election, or remove the names of persons known to be dead and of persons known not to belong to that district, correcting the names of women who have married or of persons whose names have been misspelled, or who are registered to vote are known to belong to the district but whose names have been omitted from the district list in error. The corrected registered list shall be posted at the polling place of the district at least five (5) days prior to the election and a copy submitted to the council at the same time.

(d) *Appeals relative to removal of name from list.* Any community member whose name has been removed from a registered list by an election board, or whose name has been omitted in error but not added by the board, may appeal to the community secretary and the election board for listing at least three (3) days prior to the election. If the community secretary and the election board decide that the appellant is an eligible voter, they shall decide to which district he properly belongs and shall order the appellant's name placed upon the

registered list of that district. (Ord. No. SRO-58-79, 5-2-79; Amd. to Ord. No. SRO-32-75, § 1, 12-26-79)

Sec. 3-2. Candidates.

(a) *Eligibility.* Any person who qualifies under Article III, section 4 of the constitution and bylaws of the Salt River Pima-Maricopa Indian Community shall be eligible to be a candidate for councilman, president or vice-president.

(b) *Certain persons ineligible.* No person employed in the judicial or any other branch of government of the Salt River Pima-Maricopa Indian Community or employed by any branch of the federal government or employed as the manager of any business enterprise of the Salt River Pima-Maricopa Indian Community shall be eligible to hold office as councilman, president or vice-president.

(c) *Resignation of previous employment or office.* Any person otherwise qualified to hold office but ineligible under subsection (b) hereof, may become a candidate for such office and if elected, shall assume such office provided such person resigns from the employment or office described in subsection (b) hereof at least seventy-two (72) hours prior to the time established for assuming said elected office. (Amd. to Ord. No. SRO-32-75, § 2, 12-26-79).

EXHIBIT O

Sec. 5-40. Juries.

(a) *Right to jury in criminal cases.* Any person accused of any violation of this Code of the Salt River Pima-Maricopa Indian Community may demand a trial by jury.

(b) *Jury list to be prepared.* Within thirty (30) days prior to the first day of January of each calendar year, the community council shall cause a jury list to be prepared consisting of all of the members of the Salt River Pima-Maricopa Indian Community over the age of eighteen (18) years who are not judges of the community court, employees of the community court or employees of the Salt River Police Department. The list shall be presented to the community court when it is completed.

(c) *How constituted.* A jury shall consist of six (6) members of the Salt River Pima-Maricopa Indian Community, drawn from the jury list. The drawing will be by some disinterested person or persons appointed by the judge. A minimum of ten (10) names shall be drawn from which the selections will be made. Any party to the case may challenge not more than two (2) members of the panel so chosen, except for cause.

(d) *Cause for excusing a prospective juror.* The judge may excuse a prospective juror only if the prospective juror states that any circumstances of relationship or kinship with any of the parties will cause that juror to be biased as to any of the parties, or that a prospective juror's knowledge of facts in regard to the case to be presented will predispose the prospective juror to make a decision without regard to what is presented in the case, and the judge shall excuse a prospective juror in such circumstances only if the judge is satisfied that the juror's statement is true and correct.

(e) *Conduct of voir dire.* Only the judge shall question the prospective jurors in regard to their qualifications to serve on a jury. The parties or their attorneys or advocates may submit questions to the judge for such questioning and the judge may use such questions.

(f) *Verdict.* The judge shall instruct the jury in the law governing the case; and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing laws. In criminal cases, a unanimous jury vote is necessary for a verdict. In civil cases, a majority of four (4) of the six (6) jurors is necessary for a verdict.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 84-2107 PHX WPC

ALBERT DURO,
Petitioner,
v.

EDWARD REINA, Chief of Police,
Salt River Department of Public Safety, *et al.*,
Respondents.

STIPULATION OF FACT

Petitioner and Respondents, by and through their respective attorneys, hereby stipulate to the existence of the following facts:

1. Albert Duro is a citizen of the United States. He was born in Riverside, California, on June 17, 1958, has lived all but one year of his life outside his tribal reservation, and considers himself to be a permanent resident of the State of California.

2. Albert Duro is a Cahulli Indian. He is an enrolled member of the Torrez-Martinez band of Mission Indians, a federally recognized band of American Indians.

3. Albert Duro is not a member of, nor is he eligible for membership in, the Salt River Pima-Maricopa Indian Community.

4. The Salt River Pima-Maricopa Indian Community is a federally recognized, self-governing Indian Community organized under the Indian Reorganization Act of 1934, with over 4,000 enrolled members all but 200 of whom live within the Community. Aside from two

enclaves of non-Indians living in a mobile home park at the edge of the Community and in a travel trailer park on a main road within the Community, the population of the Salt River Pima-Maricopa Indian Community consists of its enrolled members and other Indian people associated in the Community with them.

5. The Salt River Pima-Maricopa Indian Community maintains a Department of Public Safety and a court system. Edward Reina is the Chief of the Department of Public Safety and the Honorable Relman R. Manuel, Sr. is the Chief Judge.

6. On June 3, 1984 Albert Duro was arrested on alcohol and marijuana possession charges under the Salt River Pima-Maricopa Indian Community Code of Ordinances by the Salt River Pima-Maricopa Indian Community Police and, without counsel, entered a plea of guilty and was found guilty by the Salt River Pima-Maricopa Indian Community Court which sentenced him to pay a fine by Judge 15, 1984.

7. On or about the 19th day of June, 1984, Albert Duro was arrested near his home in the State of California by federal agents and charged with the murder of Phillip Fernando Brown, a member of the Gila River Indian Community (a different federally recognized Indian community) and a resident of the Victory Acres residential subdivision of the Salt River Pima-Maricopa Indian Community within the confines of the Salt River Pima-Maricopa Indian Community, by means of a firearm on or about June 15, 1984.

8. The indictment (Exhibit D to Petition) against Albert Duro was dismissed without prejudice on September 17, 1984.

9. On September 19, 1984, Mr. Duro was placed in the custody of the Salt River Department of Public Safety and continues to be held.

10. A criminal complaint against Albert Duro charging him with discharge of firearms was filed with the Salt River Pima-Maricopa Indian Community court, dated June 18, 1984 (C.R. 84-0256). The Salt River Pima-Maricopa Indian Community charges that Albert Duro "discharged at least two (2) shots from a lever action rifle in the Victory Acres Area I" of the reservation and that one of the shots killed a "14 year old boy." The criminal complaint and the federal indictment relate precisely to the same incident. The use or discharge of a firearm charged in both cases relates to the same act(s).

11. A "Motion to Dismiss" was filed with the Salt River Pima-Maricopa Indian Community Court in behalf of Albert Duro on October 4, 1984. The motion specifically argued that the Salt River Pima-Maricopa Indian Community Court did not have jurisdiction over Albert Duro, who is not a member of the Salt River Pima-Maricopa Indian Community. The Motion to Dismiss was denied and no other tribal remedies are available.

12. The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over any person otherwise subject to the jurisdiction of the Salt River Court.

13. From approximately March, 1984 until approximately June 15, 1984, Albert Duro lived within the Salt River Pima-Maricopa Indian Community with Debbie Lackey, a member of the Salt River Pima-Maricopa Indian Community, at her family home. Duro and Lackey have lived together, on an intermittent basis, in California from 1980 through 1983, except for 6 weeks they lived in Phoenix, Arizona. Lackey met Duro in California where she was born and lived during her childhood and part of her adult life.

14. Albert Duro worked for PiCopa Construction Company, a company owned by the Salt River Pima-Maricopa

Indian Community from February 1, 1984 to approximately June 15, 1984. Neither residency or membership within the Salt River Pima-Maricopa Indian Community was necessary for employment with PiCopa Construction Company.

15. A trial date is now set on the charge against Mr. Duro in the Salt River Pima-Maricopa Indian Community Court for December 3, 1984. Mr. Duro remains in custody at this time.

DATED this 19th day of November, 1984.

FREDERIC F. KAY
Federal Public Defender

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 84-2107 Phx. WPC

ALBERT DURO,

Petitioner,

vs.

EDWARD REINA, Chief of Police, Salt River Department
of Public Safety (of the Salt River Pima-Maricopa
Indian Community); *et al.*,

Respondents.

MEMORANDUM AND ORDER

Petitioner, Albert Duro, is in the custody of the Salt River Department of Public Safety, an agency of the Salt River Pima-Maricopa Indian Community. He requests that this Court issue a writ of habeas corpus commanding his discharge from tribal custody and prohibiting any further criminal prosecution by the tribe. Jurisdiction is founded on 25 U.S.C. § 1303.

The following facts are not in dispute. Albert Duro, a Cahulli Indian, is a citizen of the United States. He has lived all but one year of his life outside his tribal reservation and considers himself to be a permanent resident of the State of California. Duro is an enrolled member of the Torrez-Martinez band of Mission Indians, a federally recognized tribe of American Indians. He is not a member of, nor eligible for membership in, the Salt River Pima-Maricopa Indian Community.

The Salt River Pima-Maricopa Indian Community is a federally recognized tribal entity organized under the Indian Reorganization Act of 1934. The tribal Consti-

tution and Code provide for the maintenance of a Department of Public Safety and a court system. Edward Reina is the Chief of the Department of Public Safety and the Honorable Relman R. Manuel, Sr. is the Chief Judge.

From February 1, 1984 to approximately June 15, 1984, Duro resided in the Salt River Pima-Maricopa Indian Community and worked for PiCopa Construction Company, a tribally owned entity. Neither residency nor tribal membership is required for employment with PiCopa Construction Company.

On June 18, 1984, a criminal complaint was filed in the tribal court charging Duro with Discharge of Firearms in violation of § 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Indian Community. The complaint alleged that Duro discharged at least two shots from a lever action rifle on June 15, 1984, one of which fatally wounded Phillip Brown, a member of the Gila River Indian Community. The incident occurred within the boundaries of the Salt River Pima-Maricopa Indian Community.

On June 19, 1984, Duro was arrested by federal agents and charged with the murder of Phillip Brown. A grand jury indictment for first degree murder was returned on July 25, but was dismissed without prejudice on September 17. On September 19, Duro was transferred to the custody of the Salt River Department of Public Safety where he presently remains.

On October 4, 1984, Duro moved to dismiss the tribal action, arguing that the court could not lawfully assert criminal jurisdiction over a non-member of the tribe. The Honorable Manuel denied the motion to dismiss on October 19, and no further tribal remedies are available.

DISCUSSION

The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over "any person

otherwise subject to the jurisdiction of the Salt River Court" who commits an offense enumerated in the tribal Code of Ordinances.¹ The Code expressly provides for criminal prosecution of any non-member offender.² It is undisputed, however, that the provisions are enforced only against Indians.³ The issue before this Court is whether tribal assertion of criminal jurisdiction over non-member Indians is precluded by the equal protection and due process guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302(8).⁴ For the reasons discussed below,

¹ The jurisdictional limits of the tribal court are set forth in the Constitution and Code of the Salt River Pima-Maricopa Indian Community. Article I, Sec. 4-1 of the Constitution provides:

(c) Criminal Jurisdiction Over Persons

- (1) The court of the Salt River Pima-Maricopa Indian Community shall have jurisdiction over all offenses enumerated in the Code of Ordinances when committed by any person otherwise subject to the jurisdiction of the Salt River Court.
- (2) Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the community court.

² Sec. 2-5. Removal of nonmember lawbreakers.

Any person not a member of the Salt River Pima-Maricopa Indian Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community . . . , and or may be turned over to the custody of the United States . . . or the State of Arizona for prosecution under federal or state law.

³ Tribal enforcement of criminal provisions against non-Indians is precluded by *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011, 435 U.S. 134 (1978).

⁴ Petitioners also base their claim for relief upon the equal protection and due process guarantees of the United States Constitution. These provisions are not applicable, however, to tribal governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 98 S.Ct. 1670 (1978).

this Court concludes that Indian tribes do not have criminal jurisdiction over non-members, regardless of their race.

Federal law has historically recognized Indian tribes as distinct political communities possessed with the inherent powers of sovereign nations, including the power to make substantive law and to enforce that law within their own forums. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675 (1978); *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). Indian tribes are prohibited, however, from exercising those sovereign powers that are expressly terminated by Congress or "inconsistent with their status"⁵ as dependent nations. *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011, 435 U.S. 134 (1978).

In *Oliphant*, the United States Supreme Court held that tribal courts do not have criminal jurisdiction over non-Indians. Although the petitioner in *Oliphant* was a non-Indian, the decision has been characterized as precluding tribal court criminal jurisdiction over non-members⁶, and the Ninth Circuit appears to have implicitly adopted this interpretation.⁷

⁵ For alternative, and apparently conflicting, formulations of this test see *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962-65 (9th Cir. 1982), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, contrasting *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 (1981) (divestiture of powers not needed for tribal self-government or internal control test), to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081 (1980) (divestiture of powers inimical to overriding federal interests test).

⁶ *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 919, 455 U.S. 130, 171 (1982); *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587, 598 (9th Cir.), *cert. denied* 104 S.Ct. 1707 (1984); *U.S. v. Johnson*, 637 F.2d 1224 (9th Cir. 1980).

⁷ In *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293 (1982), the Ninth Circuit held that *Oliphant* did not preclude the finding that tribal courts retained

Respondents argue that *Oliphant* is not controlling in the instant case because the precise issue of tribal court criminal jurisdiction over non-member Indians was not before the Court. This Court's holding, however, is not dependent upon acceptance of the broader interpretation of *Oliphant*.⁸ The same result is mandated on equal protection grounds.⁹

The Indian Civil Rights Act, 25 U.S.C. § 1302, imposes certain restrictions upon tribal governments similar but

civil regulatory jurisdictions over non-Indians. In support of this holding, the Court reasoned that:

[t]o hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would, when combined with *Oliphant*, eliminate altogether any tribal jurisdiction over persons not members of the tribe

Id. at 366, quoted with approval in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 598 (9th Cir. 1983). *But see Williams v. Clark*, 742 F.2d 549 n.7 (9th Cir. 1984) (noting that whether a tribe could exercise criminal jurisdiction over non-members under any circumstances was an open question).

⁸ Although the scope of tribal criminal jurisdiction over non-members was not before the Court, support for this broad interpretation of *Oliphant* can be found in *Montana v. United States*, 101 S.Ct. 1245, 450 U.S. 544 (1981), where the Court stated:

"Though *Oliphant* only determined inherent tribal authority in criminal matters, . . . the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."

Id., S.Ct. at 1258, U.S. at 565. *See also Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 920, 455 U.S. 130, 173-74 (1982) stating:

The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "in this Nation each sovereign governs only with the consent of the governed." (citations omitted).

⁹ For a detailed analysis of equal protection issues in Indian law, see K. Erhart, "Jurisdiction Over Nonmember Indians on Reservations", 1980 Ariz.St.L.J. 727.

not identical to those contained in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo*, *supra*, 436 U.S. at 57-58, 98 S.Ct. at 1676-77. In pertinent part the Act provides:

No Indian tribe in exercising power of self-government shall (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

To withstand an equal protection challenge, differential treatment of persons must be justified by an adequate governmental interest. Traditionally differential treatment may be upheld if it bears a "rational relationship" to the achievement of a valid governmental objective. When the challenged treatment infringes upon a fundamental right or suspect classification such as race, however, the practice is subject to strict scrutiny and is valid only when necessary to achieve a compelling governmental interest.¹⁰

The discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards. Respondents

¹⁰ Racial classifications are generally analyzed under the strict scrutiny test. In regards to certain classifications establishing a preference for Indians over non-Indians, however, the Supreme Court has appeared to adopt the less stringent rational basis test. *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974) (upholding preferential treatment so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* U.S. at 555, S.Ct. at 2485). *See also United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395 (1977); *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943 (1976). The Court declined to apply the standard of strict scrutiny in these cases because the preferential treatment was accorded to "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Morton*, *supra* at 554. In contrast, the distinction utilized in the instant case is based solely upon race.

have failed to articulate any valid reason to justify the differential treatment of non-members solely on the basis of race. Non-member Indians have no greater right to involvement in tribal government than do non-Indians. Nor do they have a lesser fear of discrimination by a court system that equally precludes their participation.¹¹ Although the preclusion of tribal criminal jurisdiction over non-member Indians will necessarily reduce tribal authority to allow retention of jurisdiction over non-member Indians when similarly situated non-Indians are exempt from such enforcement.

IT IS ORDERED:

The relief requested is granted, and counsel for petitioner will promptly lodge with the Court a form of judgment consistent with the foregoing and approved as to form a counsel for respondents.

DATED January 8, 1985.

/s/ [Illegible]
United States District Judge

¹¹ Without separate evidence of an equal protection or due process violation, mere denial of participation in the political or judicial systems is insufficient grounds for the invalidation of tribal jurisdiction over nonmembers. See *United States v. Mazurie*, 419 U.S. 544, 577, 95 S.Ct. 710, 718 (1975); accord, *Confederated Salish, supra* at 964 n.31.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 84-2107-PHX-WPC

ALBERT DURO,
Petitioner,

-vs-

EDWARD REINA, Chief of Police Salt River Department of Public Safety (of the Salt River Pima-Maricopa Indian Community); and the HONORABLE RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

JUDGMENT

Filed January 15, 1985

A verified petition for writ of habeas corpus having been filed on behalf of the petitioner, Albert Duro, a hearing having been held thereon and both parties having submitted additional memorandum of argument; and on due deliberation, this Court has filed its memorandum and order on January 8, 1985.

The Court adopts and reaffirms the findings of fact and conclusions of law found, concluded, and adjudged in and by its memorandum and order given and filed herein on January 8, 1985.

It is ORDERED and ADJUDGED that the relief requested in the verified petition is granted and the

respondents are ordered forthwith to unconditionally discharge petitioner from their custody.

DATED this 14th day of Jan, 1985.

/s/ [Illegible]
Judge

The Judgment has been reviewed
and approved as to form by counsel
for respondents.

Dated this 14 day of January, 1985.

/s/ Richard B. Wilks
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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,
v.

EDWARD REINA, Chief of Police, Salt River Department
of Public Safety, Salt River Pima-Maricopa Indian
Community, *et al.,*

Respondents-Appellants.

Argued and Submitted Oct. 8, 1985

Decided July 9, 1987

Appeal from the United States District Court
for the District of Arizona

Sneed, Circuit Judge, dissented and filed opinion.

Before CHOY, SNEED, and BRUNETTI, Circuit
Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further

criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I.

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding

and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and removed him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the tribal court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from that judgment.

II.

STANDARD OF REVIEW

Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, — U.S. —, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another non-member Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving question of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011,

55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them. The Court's opinion explicitly refers only to non-Indians. However, some subsequent opinions describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173, 102 S.Ct. 894, 920, 71 L.Ed.2d 21 (1982); *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978). Other opinions describe *Oliphant's* holding as limited to non-Indians. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.¹ The holdings of the cases cited do not depend on

¹ A similar inconsistency pervades the opinions of this court. Compare, e.g., *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g., *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir. 1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for opinions are internally inconsistent on this point. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n.9, 598 (9th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549,

making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. On the one hand, there are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). On the other hand,

555 n.7 (9th Cir. 1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

ently used the word "Indian" to mean "tribal member." implying that non-Indians and nonmembers have the same status. See Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.² *Id.* at 206, 208, 98 S.Ct. 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over non-member Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401 (a) (2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim to which we next turn. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

B. Equal Protection

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil

² Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

Rights Act, 25 U.S.C. § 1302.³ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."⁴ *United States v. Antelope*, 430 U.S.

³ The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv. L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

⁴ This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra* note 3. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th

641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federally recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 1290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to non-member Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be

Cir. 1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that this is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to non-member Indians in order better to enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S.3092 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State,*

and Tribal Jurisdiction 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, — U.S. —, 107 S.Ct. 971, 976, 94L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.⁵ See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly com-

⁵ Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

mitted a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the trial court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, dissenting:

I respectfully dissent. *Oliphant* should govern this case. Two commentators recently have concluded that, for purposes of determining the criminal jurisdiction of tribal courts, *Oliphant* and the history of relevant treaties and statutes suggest that nonmember Indians and non-Indians be treated the same. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L. Rev. 979, 1022 n. 251 (1981); see Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz. St.L.J. 727, 737-49. The Supreme Court made this conclusion explicit in *United States v. Wheeler*, 435 U.S. 313, 322, 324, 326-27, 328, 98 S.Ct. 1079, 1035, 1086, 1087-88, 1088, 55 L.Ed.2d 303 (1978), by its emphasis

of tribal sovereignty as the source of the tribe's criminal jurisdiction over its *members*.

Independently of these authorities, the equal protection clause of the Indian Civil Rights Act requires affirmation of the district court. To embrace the differential treatment of non-Indians and nonmember Indians within the context of this case is to employ a classification based upon race. It is true that special treatment of Indians in many situations has not been treated as being based on race but rather on the unique sovereignty of Indian Tribes. See *United States v. Antelope*, 430 U.S. 641, 645-47, 97 S.Ct. 1395, 1398-99, 51 L.E.2d 701 (1977). That sovereignty provides no proper basis for depriving a nonmember Indian of an immunity from tribal jurisdiction enjoyed by a non-Indian. Neither does the fact that the determination of who is an Indian sometimes involves factors other than race.

Laws based on racial classifications are subject to strict scrutiny. Extending tribal court criminal jurisdiction to nonmember Indians might incrementally aid law enforcement on reservations. But then so might its extension to non-Indians. However, clearly these extensions are not necessary to achieve a compelling governmental interest. Therefore, it fails the applicable equal protection test.

Different tribes do things differently. Indian laws traditionally respects the tribes' individuality. See Clinton, *supra*, at 984-91. Limiting a tribal court's criminal jurisdiction to members of its own tribe is quite consistent with the self-determination of Indian tribes. To bar its extension to nonmember Indians does not significantly impair tribal self-determination.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,
v.

EDWARD REINA, Chief of Police, Salt River Department
of Public Safety, Salt River Pima-Maricopa Indian
Community, et al.,

Respondents-Appellants.

Argued and Submitted Oct. 8, 1985

Decided July 9, 1987

As Amended June 29, 1988

Appeal from the United States District Court
for the District of Arizona

Before CHOY, SNEED and BRUNETTI, Circuit Judges.
BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe

properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C.

§§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and moved him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the trial court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from the judgment.

II

STANDARD OF REVIEW

Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 474 U.S. 841, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); see *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and movement of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them.¹ The Court's opinion explicitly refers only to non-Indians. The Court never used the term "nonmember." However, the Supreme Court in one subsequent dissent and one subsequent opinion describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-3, 102 S.Ct. 894, 919-20, 71 L.Ed.2d 21, 50-52 (1982) (Stevens, J. dissenting). This case only concerned the Indian tribe's authority to im-

¹ In a recent decision, *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988), the Eighth Circuit concluded that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe.

The Eighth Circuit acknowledged that the Supreme Court in *Oliphant* held that the Suquamish Tribal Court lacked authority to exercise criminal jurisdiction over non-Indians and that Congress had not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians. *Greywater* acknowledges that 18 U.S.C. § 1152 may seem to indicate that Congress' use of the term "Indian" was meant to include all Indians regardless of tribal affiliation and while acknowledging the sovereign power of tribes to punish offenses against tribal law by members of a tribe found that federal preemption of a tribe's jurisdiction to punish its members for infraction of tribal law would detract substantially from tribal self-government. However, the Eighth Circuit ultimately found that the Devils Lake Sioux Tribe's exercise of criminal jurisdiction over nonmember Indians is beyond what is necessary to protect the rights essential to the tribe's self-government and is inconsistent with the overriding interest of the federal government in ensuring that its citizens are protected from unwarranted intrusions upon their personal liberty. For the reasons expressed in this amended opinion, we do not find the Eighth Circuit's reasoning persuasive.

pose a mining severance tax on *non-Indians* who were mining on the reservation. The majority opinion on occasion, and for no apparent reason, uses the term "non-member" when discussing the power of the tribe to tax "non-Indians." *Id.*, 102 S.Ct. at 903-5. This change in terms has no relevance to the decision. It is clear that the Court is discussing the tribe's authority to tax "non-Indian" miners not "nonmembers."

Justice Stevens' dissent in addressing the authority of the tribe to tax the non-Indian lessees who produce oil and gas from within the tribe's reservation in dicta miscasts *Oliphant* as holding that tribes "have no criminal jurisdiction over crimes committed by nonmembers within the reservation." *Id.* at 919. In his analysis of the power of the tribe to tax, Justice Stevens interchanges the terms "nonmember" and "non-Indian." The majority rejected his analysis that the power of an Indian tribe to exclude nonmembers was the basis for imposing a tax on the nonmembers, *Id.* at 903, 919, 920.

In *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978), Justice Stewart in dictum stated that *Oliphant* stands for the proposition that nonmembers cannot be tried in tribal courts. The term "nonmember" was used throughout the *Wheeler* opinion, however, nonmember status was not in issue as *Wheeler* was a member of the Navajo tribe, who was tried by the Navajo tribal court for a Navajo tribal code violation. At issue was not the jurisdiction of tribal courts but the possible double jeopardy effect of a prior tribal court conviction in a federal rape prosecution. The indiscriminate use of the term "nonmember" throughout the *Wheeler* opinion, 435 U.S. at 322-28, 98 S.Ct. at 1085-89, amplifies the point that Justice Stewart's statement is merely dictum. To the contrary two other Supreme Court opinions describe *Oliphant's* holding as limited to non-Indians. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105

S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985) (tribal court power to exercise civil subject matter jurisdiction over non-Indians); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).²

It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.³ The holdings

² A review of several of the authorities cited in the *Oliphant* opinion fortifies the point that its application is limited to the lack of tribal court criminal jurisdiction over non-Indians not non-member Indians. E.g. *Ex Parte Kenyon*, 14 F.Cas. 353 (W.D.Ark. 1878) ("[p]etitioner was born of white parents, had left his domicile in the Indian county and gained domicile in the state of Kansas."); 2 Op.Atty.Gen. 693 (1834) (Attorney General concludes that the Choctaw tribal courts have no jurisdiction over white citizens nor over Negro slaves owned by white citizens.); *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113 (1970) (Solicitor General of the Department of Interior concludes that Indian tribes do not possess criminal jurisdiction over non-Indians).

³ A similar inconsistency pervades the opinions of this court. Compare, e.g., *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) with, e.g., *United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir. 1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably non nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. See *Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir. 1984).

of the cases cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the liberal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. There are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24

(whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

L.Ed.2d 494 (1970)). One commentator has implied that non-Indians and nonmembers have the same status. The implication was derived from an analysis of statutes that allow states to assume criminal and civil jurisdiction over Indian country with the consent of the tribe occupying the particular Indian country. 25 U.S.C. §§ 1321, 1322 and 1326. We do not agree with that implication.⁴

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argu-

⁴ See Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

The comment only postulates that nonmember Indians and non-Indians be treated the same. The comment acknowledges that changes in Indian treaty provisions in the 18th and early 19th centuries make Congress' intent uncertain on the issue of federal versus tribal criminal jurisdiction. These language changes might indicate, the comment suggests:

"[T]hat Congress meant to assume federal jurisdiction over offenses between nonmember Indians and tribal members in the same manner it had previously assumed federal jurisdiction over offenses between non-Indians and tribal members. On the other hand Congress may have intended the change of language to merely reflect the applicability of a treaty to only the signatory tribes." *Id.* at 738 (emphasis added).

At the same time the comment proposes that by examining treaty provisions, the intent of Congress to assume jurisdiction over nonmember Indians is made clear. Yet later the author, examining federal statutes (25 U.S.C. §§ 1321, 1322 and 1326) states that Indian and nonmember Indians can only be implicitly equated.

The problems is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area. Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations.

As for *Oliphant*, the comment acknowledged several times that it is limited to non-Indians.

ment was the core of the Court's opinion.⁵ *Id.* at 206, 208, 98 S.Ct. at 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over nonmember Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim which we address later. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

Rather, what is more dispositive of this case is the federal criminal statutory scheme⁶ and its treatment of crimes committed by Indians. 18 U.S.C. § 1151, et seq.

⁵ Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

⁶ In addition to the statutory scheme, the regulatory scheme promulgated by the Department of Interior's Bureau of Indian Affairs establishing Courts of Indian Offenses states that those courts "shall have jurisdiction over all offenses . . . when committed by any Indian, within the reservation or reservations for which the court is established . . ." 25 C.F.R. § 11.2(a) (1987) (emphasis added). We find it instructive that the regulations fail to limit jurisdiction of these courts only to offenses committed by Indians of the tribe for which the particular court is established. (The regulations deem an Indian for purposes of these courts "to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 25 C.F.R. § 11.2(c) (1987). There is no distinction made as to the status of nonmember Indians.)

That statutory scheme subjects individuals to federal prosecution "by virtue of their status as Indians." *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977). For purposes of the federal criminal statutes the important inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in *United States v. Heath*, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. §§ 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation. The reason was the absence of a federal relationship between the Klamaths and the United States as a result of the termination of federal supervision over the Klamath Tribe by the Klamath Termination Act; 25 U.S.C. § 564 et seq. *Id.* at 19. Under 18 U.S.C. § 1153 jurisdiction is based upon a crime committed by one Indian against another Indian within the Indian country. It was not suggested that federal jurisdiction was lacking because the Klamath was on the reservation of the Warm Springs Tribe, where she enjoyed no tribal relationship.

Granted, the discussion so far has been concerned with federal jurisdiction and not tribal. However, it cannot be ignored that the two are interwoven. Thus in *Arizona ex rel Merrill v. Turtle*, *supra*, we held that Navajo tribal sovereignty precluded Arizona from arresting a Cheyenne Indian on the Navajo Reservation for the purpose of extraditing him to Oklahoma. We recognized by analyzing the terms of the Treaty of 1868 between the Navajos and the United States that a tribe has the right to exercise power over the Indian residents of its reservation, without distinction as to whether the Indian was a member of the tribe or not. *Id.* at 686.

The structure of criminal jurisdiction in Indian country, as far as it relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to *that or some other tribe* . . . [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886) (emphasis added). The statute has *never* been restricted in its application to Indians who are members of the "host" tribe.

Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under 18 U.S.C. § 1152. That statute makes applicable in Indian country those criminal laws applicable in areas of exclusive federal jurisdiction with several exceptions.⁷

As 18 U.S.C. § 1152 has been applied it has also been assumed that references to "Indian" meant any Indian not just Indians who were members of the host tribe. In *United States v. Burland*, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971) we applied the statute to a member of the Confederated Salish and Kootenai Tribes who committed a crime on the Flathead Reservation. We noted, citing *Kagama*, *supra*, that Burland did not argue "that the statute was in-

⁷ The statute does not apply to offenses committed by one Indian against the person or property of another Indian, nor to an Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

applicable to him because he was a member of a tribe other than the local tribe and was visiting from another reservation." *Id.* at 1200, n. 1.

Furthermore, in discussing the Major Crimes Act, we held in *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980) that except for the crimes specifically enumerated in the Act, "the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country." *Id.* at 1231. Again we declined to make a distinction between member and nonmember Indians.

The cases discussing the federal criminal statutory scheme clearly indicated that if Congress had intended to divest tribal courts of criminal jurisdiction over non-member Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.

B. Equal Protection

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.⁸ The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifi-

⁸ The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv.L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

cations ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. Racial classification

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."⁹ *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federal recognized Indian tribes, which are political rather than racial groups. See *Morton v. Mancari*, 417 U.S. 535, 553, n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are

⁹ This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. See *supra* note 8. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. See, e.g., 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associ-

ated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that his is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. Rational basis

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order to better enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs*, 98 Cong., 2d Sess, 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this con-

sideration was outweighed by the injustice of treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 976, 94 L.Ed. 2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959).

We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. A Jurisdictional Void

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians. Thus only a state court could have jurisdiction over Duro.¹⁰ See D. Getches, D. Rosenfelt & C. Wilkinson,

¹⁰ Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. See *United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians

Cases and Materials on Federal Indian Law 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands; A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by assuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, Dissenting:

The majority has substantially revised its opinion since it first appeared at 821 F.2d 1358-64 (9th Cir.1987). It is, therefore, appropriate that my dissent be revised, particularly in light of the fact that the intervening deliberations have provided to me additional insights that have strengthened my resolve to dissent.

In my original dissent, I stated "*Oliphant* should govern this case." *Id.* at 1364. That remains true, but now I am more ready to concede that it need not. The underpinning of its holding was the history of the relationship between the United States and Indian tribes generally and the Suquamish Tribe in particular. Emphasis was placed upon the fact that the tribes seldom, if ever, exercised criminal jurisdiction over non-Indians prior to the middle of this century. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97, 98 S.Ct. 1011, 1014-15, 55 L.Ed.2d 209 (1978). The same undoubtedly cannot be said with respect to the exercise of criminal jurisdiction over Indians not members of the adjudicating tribe. Therefore, I conclude that the *ratio decidendi* of *Oliphant* is not applicable to this case.

Nonetheless, *Oliphant* exists. Its holding that neither the existing residual tribal sovereignty nor a grant of power by Congress authorized the exercise of criminal jurisdiction by a tribe over a non-Indian leaves open the question whether either supports the exercise of such jurisdiction over a nonmember Indian. I believe neither does. My reasons, succinctly stated, are as follows:

(1) *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), makes clear that retained

tribal sovereignty exists to govern the behavior of tribal members. No necessity exists to expand its reach.

(2) No federal statute explicitly grants to tribal authorities the power to exercise criminal jurisdiction over nonmembers. 18 U.S.C. § 1152 does not exclude such a grant but it does not require it. Nor does existing case law require it.

(3) To subject nonmember Indians to tribal jurisdiction discriminates against the nonmember both actually and potentially. This discrimination is not justifiable.

I now shall address each of these positions in greater depth.

I.

RETAINED TRIBAL SOVEREIGNTY

To understand the scope of *United States v. Wheeler*, *supra*, it is helpful to point out that both *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Wheeler* originated in this circuit and that each constituted a reversal of this circuit's prior decision. In *Oliphant*, this circuit extended criminal tribal jurisdiction to non-Indians, while in *Wheeler* it made any conviction by a tribal court of any crime over which it had jurisdiction a bar to prosecution by the United States of the greater offense of which the tribally prosecuted lesser included offense was a part. The circuit court in *Wheeler* undoubtedly was influenced by the expansion of tribal authority recognized by *Oliphant*. To reach its result in *Wheeler*, this court reasoned that the United States and the Navajo Tribe should not be treated as dual sovereigns for double jeopardy purposes.

It was this proposition against which much of the Supreme Court's opinion in *Wheeler* is directed. It must be remembered that the Court no doubt considered *Wheeler* and *Oliphant* contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided *Oliphant* by rejecting the expansion of the authority of tribal courts over

crimes by non-Indians, it would not have been surprising to have found the Court in *Wheeler* using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in *Wheeler*. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its *members*. Two examples of this focus are as follows:

Moreover, the sovereign power of a tribe to prosecute its *members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers* of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 [94 S.Ct. 772, 777-778]; *Johnson v. M'Intosh*, 8 Wheat. 543, 574 [5 L.Ed. 681]. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559 [8 L.Ed. 483]; *Cherokee Nation v. Georgia*, 5 Pet., at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 [3 L.Ed. 162] (Johnson, J., concurring). And, as we have recently held, they cannot try *nonmembers* in tribal courts. *Oliphant v. Suquamish Indian Tribe*, *ante*, [435 U.S.] p. 191 [98 S.Ct. p. 1011].

435 U.S. at 326, 98 S.Ct. at 1087 (emphasis added).

In sum, the power to punish offenses against tribal law committed by Tribe *members*, which was part of

the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. at 1088 (emphasis added) (footnotes omitted). Others appear in the margin.¹

¹ It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people with the power of regulating their internal and social relations." *United States v. Kagama*, *supra*, 118 U.S. at 381-382, 6 S.Ct. at 1112-1113; *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 80 L.Ed. 25. Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions. *United States v. Antelope*, 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395, 1397 n. 2; *Talton v. Mayes*, 163 U.S. 376, 380, 16 S.Ct. 986, 988, 41 L.Ed. 196; *Ex parte Crow Dog*, 109 U.S. 556, 571-572, 3 S.Ct. 396, 405-406, 27 L.Ed. 1030 (1883); see 18 U.S.C. § 1152 (1976 ed.), *infra*, n. 21.

435 U.S. at 322, 98 S.Ct. at 1085 (emphasis added) (footnote omitted).

The Indian tribes are "distinct political communities" with their own mores and laws, *Worcester v. Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their *members* and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U.S. at 571 [3 S.Ct. at 405].

Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its *members* for infractions of tribal law would detract substantially from tribal self-government, just

The lesson to be drawn appears to me to be clear. Retained tribal sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate. The upshot is that the majority wishes to enhance slightly tribal powers while I do not.

II.

DO FEDERAL STATUTES GRANT TO TRIBES POWER TO IMPOSE CRIMINAL PUNISHMENT ON NONMEMBER INDIANS?

The majority devotes substantial space to arguing that federal statutes have given tribal courts the power to subject nonmember Indians to its criminal jurisdiction. See pp. 12-16 [Brunetti draft]. It asserts that certain cases have assumed that such jurisdiction exists and that "the structure of criminal jurisdiction in Indian country," p. 14[B.d.], also suggests that this is true.

I shall address each case cited by the majority. Only a portion of a sentence appearing in *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977), was quoted by the majority, apparently to make the point that federal criminal statutes focus on "Indians" without the qualified "tribal member" on "non-tribal member." The full sentence is:

The question presented by our grant of certiorari is whether, under the circumstances of this case, fed-

as federal preemption of state criminal jurisdiction would trench upon important state interests.

Id. at 331-32, 98 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

eral criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

The "circumstances of this case" were that members of the Coeur d'Alene tribe murdered a non-Indian in the Coeur d'Alene reservation and sought to be tried under Idaho law rather than federal law pursuant to the Major Crimes Act, 18 U.S.C. § 1153. The Court rejected the defendants' constitutional argument. It was not necessary to address whether any distinction between members of the Coeur d'Alene tribe and nonmembers existed. To have said each time the word "Indians" was used, "including both members and nonmembers," would have been absurd. The case simply is not relevant to the issue before us.

The majority itself recognized the marginal significance of *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974), to the issue before us. I would go further and assert that it has no relevance whatsoever. The issues before the court in *Heath* were whether the United States could indict an Indian of a terminated tribe under the Major Crimes Act, 18 U.S.C. § 1153,² and, if not, whether the attempt to do so was prejudicial error when the crime charged was murder, as defined in 18 U.S.C. § 1111, and

² 18 U.S.C. § 1153 reads in relevant part as follows:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

committed in "Indian country" and, thus, subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. § 1152.³ This court held that the defendant, as an Indian of a terminated tribe, must be treated as any other non-Indian citizen of the state. As a result, 18 U.S.C. § 1153 could not provide a basis for federal jurisdiction. It applies, this court held, only when the "Indian who commits [certain crimes] against the person or property of another Indian or other person," § 1153, is an Indian as to whom the United States has a "special responsibility." *Heath*, 509 F.2d at 19. A person, who happens to be an Indian and was once a member of a now terminated tribe, could have been indicted, as could have been any other person, under 18 U.S.C. § 1152. The court concluded that under these circumstances the indictment under 18 U.S.C. § 1153 was not prejudicial error.

The issue of tribal court jurisdiction over a nonmember Indian was irrelevant to the question that *Heath* raised. Had the *Heath* court believed that the tribal court had criminal jurisdiction over a nonmember it would have affected neither its reasoning nor its result. The crucial issue, as seen by *Heath*, was whether the United States had a "special responsibility" with regard to the defendant, not whether the defendant was a member of the victim's tribe. The majority says it did not occur

³ Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

11 U.S.C. § 1152.

to the *Heath* court to suggest "that federal jurisdiction is lacking because the Klamath [the defendant Indian] was on the reservation of the Warm Springs Tribe, where he enjoyed no tribal relationship." [B draft p. 3] Of course, it did not. It was irrelevant. To overlook an issue that could have been controlling is significant; to refrain from addressing one that is irrelevant only mercifully saves both the reader's eyes and time.

The majority's use of *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970), is a bit closer to the mark at which it is shooting. Unfortunately, a miss is a miss, however. This court, in holding that the Navajo Tribe need not accede to Arizona's effort to extradite a Cheyenne Indian resident on their reservation to the State of Oklahoma, emphasized the retained sovereignty of the Tribe. We pointed to the Treaty of 1868, the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the codification of the Navajo Tribe's extradition responsibilities in its Tribal Code, and the approval of that Code by the Commissioner of Indian Affairs. None of those sources of law required the Tribe to accede to Arizona's request. Indeed, the Tribal Code expressly precluded any such accession.

The case, therefore, is consistent with the existence of substantial retained sovereignty and for the purposes of the case treated members and nonmembers the same. This similarity of treatment was rooted in the 1868 Treaty that spoke of "bad men among the Indians," who committed wrongs against anyone "subject to the authority of the United States," a group that undoubtedly includes, from time to time, whites as well as nonmember Indians. But it goes no further. It simply does not address the jurisdiction of the Navajo Tribe to subject nonmembers to criminal prosecution. If one repeats "tribal sovereignty" over and over again, the hypnotic power of the

phrase may lead one to conclude that such jurisdiction in a given situation exists. Reasoning, not self-hypnosis, is the way of the law, however.

Enough has been said to suggest that neither 18 U.S.C. § 1152 nor 18 U.S.C. § 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

The Federal Enclaves Act, 18 U.S.C. § 1152, also does not unequivocally support the majority. Its principal purpose is to extend to "Indian country" the general laws of the United States. The reach of those laws within "Indian country" clearly is unaffected by whether the offender is an Indian or a non-Indian. See *Mull v. United States*, 402 F.2d 571, 573 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107, 89 S.Ct. 917, 21 L.Ed.2d 804 (1969). On its face, 18 U.S.C. § 1152 also would appear not to draw a distinction between a victim who is Indian and one who is not. However, it has been long established that the statute does not embrace an offense by a non-Indian against a non-Indian even when committed in Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 869, 26 L.Ed. 869 (1882); see *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Mull v. United States*, 402 F.2d at 573.

An offense by an Indian against a non-Indian, on the other hand, is within the statute. See *United States v. Burland*, 441 F.2d 1199, 1203 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971). And it is true, as *Burland* holds, that the Indian offender need not have committed his crime within the reservation

limits of the tribe of which he is a member. Cf. *United States v. Kagama*, 118 U.S. 375, 382, 6 S.Ct. 1109, 1113, 30 L.Ed. 228, 231 (1885). All that is necessary is that it have been committed in "Indian country."

The position of the majority emerges in its most forceful form when the focus is fixed upon the exceptions to 18 U.S.C. § 1152. These are (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," and (3) any offense where by treaty exclusive jurisdiction "is or may be secured to the Indian tribes respectively." Only the first would be affected by taking *Wheeler* at its word and rejecting the position of the majority. In essence, the majority argues that because there is no explicit provision for relieving the nonmember Indian from tribal jurisdiction in the first exception, he must be subject to the tribe's criminal jurisdiction. It buttresses this by pointing out, as already indicated, that 18 U.S.C. § 1152 is applicable generally without regard to whether the offender was a member of the Tribe on whose reservation the offense was committed. Thus, tribal membership, it argues, also should be irrelevant in applying the exception.

The conclusion does not follow. To disregard membership in construing the broad reach of 18 U.S.C. § 1152 protects Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to enhance the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist. Finally, there is no more reason to treat the literal language of the statute as all encompassing than there was in the case of the non-Indian offense against the non-Indian. See *McBratney*, 104 U.S. 869, *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307.

I acknowledge that the exclusion of nonmember Indians from the jurisdiction of tribal courts will impose somewhat greater responsibilities on certain United States Attorneys.⁴ Nonmember offenses not directed at another Indian, and not described in the Major Crimes Act, 11 U.S.C. § 1153, must be prosecuted by these officials. This category embraces such things as drunk and disorderly conduct.

The majority also suggests that state prosecutors and state courts may become involved in law enforcement. This concern appears to be premised on the assumption that an offense by a nonmember Indian against another Indian, which is not a major crime, would not be covered by 18 U.S.C. § 1152 were my view to prevail. Thus, the majority suggests state law enforcement would be required to fill the gap.

I suggest the majority has misread 18 U.S.C. § 1152. To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently. To the extent the offense each commits is not proscribed by federal law, the Assimilative Crimes Act, 18 U.S.C. § 13, will import the applicable state law to be applied by federal authorities and courts.

The fear of the majority can be put this way. As they see it, an offense which is not a major one by an Indian against an Indian is excluded from federal jurisdiction

⁴ And possibly on state prosecutors if, as has been suggested by some, "victimless" crimes by non-Indians (and nonmember Indians by the reasoning of the dissent) fall within the exclusive jurisdiction of state courts. See 3 Op. Off. Legal Counsel 111 (1979).

when tribal jurisdiction is lacking because the offender is a nonmember. I suggest that under those circumstances the offense "escapes" the first exception to the general rule of 18 U.S.C. § 1152 but does not "escape" the broad reach of 18 U.S.C. § 1152. That is, the offense remains an offense by an Indian within Indian country and thus subject to the general laws of the United States, but, for the reason stated here, should not be considered as one committed by one Indian against another within the meaning of the first exception to 18 U.S.C. § 1152. Put more simply, the nonmember Indian should be treated as a non-Indian.

III.

DISCRIMINATION AGAINST THE NONMEMBER INDIAN

In my original dissent, I lumped all the discriminatory possibilities to which the majority subjected the nonmember Indian under the heading of equal protection. The majority in its original and revised opinion addresses the equal protection issue and concludes that there is a rational basis for subjecting the nonmember to tribal jurisdiction and that, in any event, in this case Duro is not being discriminated against on the basis of race.

On reflection, I have concluded that it is not essential to my position to fit the facts of this case to the analytics of the equal protection doctrines. Rather, I have employed the discriminatory possibilities this case suggests to inform my interpretation of the applicable statutes and cases. These possibilities may, but need not, rise to the level of equal protection violations. Their existence suggests, however, that wise construction of the applicable law should reduce, if not eliminate, their existence.

The heart of the issue this case presents, as this dissent already has stated, is that the majority puts the offending nonmember Indian in a position different from, and

less advantageous than, that of any other class of offender. The member Indian offender is "among his own," which presumably is frequently to his benefit. The non-Indian is protected by *Oliphant, supra*, from possibly harsh treatment by a tribal court animated by a bias against all non-Indians. And the Indian no longer enjoying the "special relationship" with the federal government enjoys the same protection as does the non-Indian. Only the nonmember Indian still enjoying that "special relationship" must be subject to a tribunal that, on its face, suggests the possibility of prejudice against him.

It is not beyond the pale of proper judicial behavior to employ an interpretation of the law that eliminates this possibility. In the final analysis, the majority has suggested only two rather weak reasons for not doing so, *viz.*, to enhance tribal sovereignty and to avoid burdening U.S. Attorneys and their staffs. Inasmuch as the contribution to these ends made by the majority's approach is only marginal at best, I would hold that the price demanded for these modest achievements is too high. Tribes would lose no meaningful sovereignty under my analysis nor would U.S. Attorneys become overburdened.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,

v.

EDWARD REINA, Chief of Police, Salt River Department
of Public Safety, Salt River Pima-Maricopa Indian
Community, *et al.,*

Respondents-Appellants.

Nov. 2, 1988

Appeal from the United States District Court
for the District of Arizona

Before CHOY, SNEED, and BRUNETTI, Circuit Judges.

ORDER

Judge Choy and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends accepting the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. Fed.R.App.P. 35(b). A majority of the judges voted against en banc consideration. Judge Ko-

zinski's dissent from the order denying rehearing en banc is attached.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom LEAVY and TROTT, Circuit Judges, join, dissenting from the order denying rehearing en banc.

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir.1988), a panel of our court has cast off the map and the compass. The panel's holding—that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe—overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals. This is a serious matter deserving serious attention. I therefore respectfully dissent from the order denying rehearing en banc.

I

Petitioner Albert Duro is a member of the Torrez-Martinez band of Mission Indians. From March 1984 to June 1984, Duro lived on the Salt River Indian Reservation, the home of the Salt River Pima-Maricopa Indian Community, a tribe in which Duro is ineligible for membership. While on the Salt River Reservation, Duro allegedly shot and killed a fourteen year old boy. Criminal complaints against Duro were filed in both federal district court and the Salt River Pima-Maricopa Indian Community Court.

The panel holds that the tribal court has criminal jurisdiction over Duro, a member of a wholly different tribe, simply because he is an Indian. As discussed more

fully below, this one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided.

II

A. Disregard of Supreme Court Authority

The panel laments the lack of Supreme Court guidance on the question before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1152. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labeling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has charted a clear course through these waters, a course that the Eighth Circuit had no difficulty following. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988).

The course starts with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the Court held that tribes could not exercise criminal jurisdiction over non-Indians.¹ Standing alone, *Oliphant* leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians

¹ The panel correctly notes that *Oliphant* has been widely criticized. 851 F.2d at 1142, n.5. See Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1987 Wis.L.Rev. 219, 267-74; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479 (1979); Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn.L.Rev. 609 (1979). Yet *Oliphant* remains law and continues to be, at least in the Supreme Court's view, the progenitor of a series of tribal jurisdiction decisions. The panel may well be right in joining the chorus, 851 F.2d at 1141-42, but the academic criticism, no matter how strong, cannot overrule a decision of the Supreme Court.

who are not members of the forum tribe. A series of subsequent decisions have elaborated on *Oliphant*, however, effectively foreclosing this possibility.

Only two weeks after *Oliphant* the Court decided *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978). *Wheeler* raised the question whether the defendant (a member of the Navajo tribe) could be tried in federal court after the Navajo tribal court had convicted him of the same conduct. To resolve this question, the Supreme Court had to examine the source of the tribe's authority over *Wheeler*.² The Court concluded that the jurisdiction derived from the tribe's retained authority, i.e., that aspect of the tribe's sovereignty it had not given up by virtue of incorporation into the United States. In reaching this conclusion, the Court drew a sharp distinction between those sovereign powers the tribe had surrendered and those it had not:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among mem-

² The source of the authority was crucial for double jeopardy purposes: If the tribe derived its authority from Congress, the defendant would face double jeopardy because both prosecutions would be on behalf of the same sovereign. See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937) (double jeopardy clause bars successive prosecutions by federal and territorial courts because they are "creations emanating from the same sovereignty"); *Waller v. Florida*, 397 U.S. 387, 393, 90 S.Ct. 1184, 1187, 25 L.Ed.2d 435 (1970) (barring successive prosecutions by a city and by the state of which the city is a political subdivision). If the sources were different (as in the case of separate state and federal prosecutions), then the double jeopardy clause would not bar subsequent prosecution by the United States. See *Wheeler*, 435 U.S. at 329-30, 98 S.Ct. at 1089-90.

bers of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326, 98 S.Ct. at 1087 (emphasis added). Speaking precisely to the issue presented in our case, the Court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts." *Id.* (citing *Oliphant*, 435 U.S. at 191, 98 S.Ct. at 1011).

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort: It is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. More important, when cited by the Court in support of its only characterization of *Oliphant* that makes sense. As the Eighth Circuit recognized, "[t]he *Wheeler* Court's analysis distinguishing nonmember Indians from tribal members was not inadvertent. Its very analysis requires such distinction." *Greywater*, 846 F.2d at 491. If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*.³

³ The majority minimizes *Wheeler* by describing its use of the term "nonmember" as "indiscriminate." 851 F.2d at 1140. The fact that the Court refers to both nonmembers and non-Indians in some of its opinions does not, however, reveal sloppy thinking or the random use of language. When the Court merely describes the facts presented by *Oliphant* or other cases, it usually employs the term non-Indian. See, e.g., *Montano v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). When it discusses its rationale, the Court repeatedly distinguishes along the line of tribal membership and not race. See, e.g., *Montana*, 450 U.S. at 563-64, 101 S.Ct. at 1257-58; *Colville*, 447 U.S. at 155-61, 100 S.Ct. at 2082-85.

But *Oliphant* and *Wheeler* were only the first manifestations of the Court's emerging theory limiting tribal jurisdiction to members of the tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court considered whether a state could impose various taxes on cigarettes and other items sold by tribal enterprises on the reservation. The Court held that the state could properly tax sales to nonmembers of the tribe, but not sales to members. Most important, the Court addressed the issue—crucial in our case—of the status of the Indians who were not members of the tribe in question:

[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchases contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that non-members have a say in tribal affairs or significantly share in tribal disbursements.

Id. at 161 100 S.Ct. at 2085 (emphasis added); see also *id.* at 187, 100 S.Ct. at 2098 (Rehnquist, J., concurring in part) ("[t]he fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share"). Although the Court was discussing a tribe's immunity from taxation, not its criminal juris-

diction, the Court was clearly drawing on a broader theory of tribal sovereignty: A tribe acts as a sovereign only with respect to its own members.

The panel disregards *Colville*, just as it disregards *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), where the Court provided its most explicit statement yet as to the boundaries of tribal sovereignty. *Montana* draws a clear distinction between a tribe's power over its own members and its power over nonmembers. At issue was whether a tribe could prohibit hunting and fishing by nonmembers on reservation land not owned by the tribe. Applying the principles announced in *Wheeler*, the Court concluded that the tribe could not prohibit such activities:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. at 1257 (emphasis added; citations omitted). Significantly, the Court viewed its conclusion as flowing from the rationale of *Oliphant*: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S.Ct. at 1258 (emphasis added; footnote omitted). The exercise of criminal jurisdiction is plainly an "inherent sovereign power."

As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.⁴

⁴ The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. The states already exercise exclusive jurisdiction over similar offenses (both violent and victimless) committed on the reservation involving solely non-Indian defendants and victims. See F. Cohen, *Handbook of Federal Indian Law* 352-53 & n.47 (1982 ed.). The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. Any such disparate treatment would violate the equal protection clause of the fourteenth amendment, subjecting state officials to liability under 42 U.S.C. § 1983 (1982). See *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (state officials liable under section 1983 where they know or should know that their conduct violates a clearly established constitutional right); *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973) (per curiam) (law enforcement officers may be liable under section 1983 for failure to enforce the law equally and fairly); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to

B. Equal Protection

Another very troubling aspect of the panel's opinion is its handling of Duro's equal protection claim. Duro argues that, by asserting jurisdiction over Indians but not over non-Indians, the tribe has violated the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8) (1982 & Supp. IV 1986). While a distinction based solely on tribal membership could be sustained on a rational basis alone, Duro contends that the distinction in this case is based on race and does not survive strict scrutiny. The panel rejects this argument and, in doing so, makes two fundamental errors. First, the majority relies on cases holding that *Congress* need not have a compelling governmental interest in enacting statutes that discriminate between Indians and non-Indians in order to survive an equal protection challenge. See *United States v. Antelope*, 430 U.S. 641, 97 S.Ct.

single out Indians in ways "that might otherwise be constitutionally offensive"). The panel cites no support for its proposition.

The far more plausible assumption is that states would exercise their jurisdiction fully and responsibly. Non-Indian residents of reservations apparently outnumber nonmember Indian residents by a substantial margin. Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc at 9-10; see *Greywater*, 846 F.2d at 493. The states would therefore experience only a marginal increase in law enforcement responsibilities on the reservation. Moreover, some tribes already restrict their own criminal jurisdiction to tribal members. See, e.g., *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 & n.4 (9th Cir. 1976) (declining to rule on whether the tribe has inherent power to assert criminal jurisdiction over nonmembers because tribal constitution permits criminal jurisdiction only over members); Cohen, *supra* note 5, at 357 n.77 ("[o]ther tribes have laws restricting tribal jurisdiction to members"). Presumably some authority steps into fill the jurisdictional void created in such cases; the states are a logical choice. See *id.* at 357 n.79 ("[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader"); *Greywater*, 846 F.2d at 490 n.3 ("Petitioners were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident.").

1395, 51 L.Ed.2d 701 (1977) (federal jurisdiction over Indian defendants under Major Crimes Act, 18 U.S.C. § 1153); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (Bureau of Indian Affairs employment preference for enrolled Indians). These cases are inapposite where there is no congressional pronouncement on the issue and the tribe is exercising its retained sovereignty. Second, the panel holds that the classification in question is not racial at all because race is merely one of several factors that go into drawing the distinction at issue. This holding cannot be squared with established principles of equal protection.

The considerations that led the Court to uphold congressional Indian/non-Indian distinctions are irrelevant where, as here, Congress has not acted. The Constitution has been interpreted as granting Congress "plenary power . . . to deal with the special problems of Indians." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483; see *Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398; U.S. Const. art. I, § 8. Moreover, congressional enactments affording special treatment to Indian tribes and their members are based on a long "history of treaties and the assumption of a 'guardian-ward status.'" *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483. Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . ." *Antelope*, 430 U.S. at 646, 97 S.Ct. at 1399 (quoting *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24); see also *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484 (BIA preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party).

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books. *Mancari*, 417 U.S. at 552, 94 S.Ct. at 2483; *see id.* at 555, 94 S.Ct. at 2485 (permitting special treatment of Indians so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

On the other hand, the Court has never held that a tribe may exercise its authority in a racially discriminatory manner. As the Court held in *Wheeler*, Indian tribes derive their power to conduct criminal trials not from Congress but from their own retained sovereignty. The two are quite different. Indian tribes may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The panel's holding that they may is without precedent or authority.

More disturbing still, the panel holds that the distinction based on Indian status is not a racial classification because factors other than race are taken into account. 851 F.2d at 1144. While this may be true when the distinction is made by Congress, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one

of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977). Either race was considered in the decision in which case strict scrutiny is invoked, or race was not considered, in which case the rational basis standard applies. You can't have it both ways. In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. *See id.* (racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny); *see also* L. Tribe, *American Constitutional Law* § 16-14, at 1472 (2d ed. 1988) ("any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny . . ."). Under strict scrutiny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong.⁵

⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) suggested that, because tribes are sovereigns pre-existing the Constitution, they may be exempt from constitutional provisions (such as the fifth and fourteenth amendments) limiting the power of federal and state authorities. The equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), however, extends to any person within a tribe's jurisdiction. While ICRA's equal protection clause may not be co-extensive with the constitutional equal protection clause, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir. 1976); *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir. 1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n.9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

C. Potential for Biased Tribunals

There is yet another troubling aspect of the opinion: its failure to address or even consider the possibility that it may be subjecting Duro to adjudication by a biased tribunal. Judge Sneed, in dissent, gave the subject thoughtful attention. 851 F.2d at 1151-52 (Sneed, J., dissenting). The *Greywater* panel thought the matter significant enough to merit discussion:

As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These non-member Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Greywater, 846 F.2d at 493. The *Duro* majority ignores the subject.

Indian tribes differ in material respects from political entities to which we are accustomed. They have broad authority to determine the qualifications for membership, which often are based on degree of tribal blood. Cohen, *supra* note 5, at 20-23. To be eligible for membership in the Salt River Pima-Maricopa Indian Community, a person must not be a member of another tribe. Salt River Pima-Marcipoa Community Const. art. II, § 1; Salt River Pima-Maricopa Community Code § 2-1(a) (Supp. No. 2). As noted, Duro is thus ineligible for membership in the community which will decide his fate. The exclusion of otherwise eligible individuals who belong to another tribe underscores the possibility that those who do not qualify for tribal membership may be treated in an unfair or discriminatory fashion. Indeed, the possibility

that there may be hostility or mistrust between Indian tribes is not a far-fetched concern. As reported in testimony given recently before the Civil Rights Commission, at least one such situation currently exists, giving rise to what many perceive as miscarriages of justice:

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute. . . .

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court. . . . It is my personal experience that these individuals have experienced a violation of their . . . right to trial by impartial jury. . . .

....

I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.

....

... Hopi Tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the court-

room and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land. . . . [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed. . . .

Enforcement of the Indian Civil Rights Act: Hearings Before the United States Commission on Civil Rights (Aug. 13-14, 1987) at 219-20 (testimony of Lee Brook Phillips, attorney).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

III

Despite warnings from Judge Sneed's powerful and persuasive dissent, despite the unanimous decision of another circuit, the court today stands by a panel opinion that simply does not do justice to the sensitive and important issues presented to us. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 88-6546

ALBERT DURO,
Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed April 24, 1989

ON CONSIDERATION of the motion for leave to proceed herein *forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in *forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 24, 1989

6
NO. 88-6546

Supreme Court, U.S.

FILED

AUG 7 1989

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public Safety,
Salt River Pima-Maricopa Indian Community;
and the HON. RELMAN R. MANUEL, SR.,
Chief Judge of the
Salt River Pima-Maricopa Indian Community Court,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

(1) Does the Salt River Pima-Maricopa Indian tribal court of Arizona have criminal jurisdiction over Albert Duro, a non-member Cahuilla Indian from California, for the alleged offense of "discharge of firearms"?

(2) Does the imposition of criminal jurisdiction of a foreign Indian Tribe over some nonmembers, simply because they are Indians, but not upon other, similarly situated nonmembers, simply because the latter group are non-Indians, violate the "equal protection" provisions of the Indian Civil Rights Act.?

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OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the District of Arizona dated January 8, 1985, is unreported. A copy of the District Court's memorandum and order is reproduced in the joint appendix at pages 64-70.

The first opinion of the United States Court of Appeals for the Ninth Circuit is reported at 821 F.2d 1358 (9th Cir. 1987), while the amended opinion is reported at 851 F.2d 1136 (9th Cir. 1988). Both opinions are reproduced in the joint appendix at pages 73-86 and 87-117 respectively.

Finally, the dissent of Circuit Judge Kozinski, joined by Judges Leavy and Trott, from the denial of rehearing *en banc* is reported at 860 F.2d 1463 (9th Cir. 1988) and reproduced in the joint appendix at pages 118-132.

JURISDICTION

On November 2, 1988, the Court of Appeals for the Ninth Circuit issued an order denying Mr. Duro's petition for rehearing and rejecting his suggestion for rehearing *en banc*. The jurisdiction of this Court was invoked under Title 28 U.S.C. Sections 1254 (1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutes are set forth in an appendix to this brief:

Title 18 U.S.C. Section 1152	Title 25 U.S.C. Section 1302
Title 18 U.S.C. Section 1153	Title 25 U.S.C. Section 1303
Title 18 U.S.C. Section 1301	Title 8 U.S.C. Section 1401(b)

STATEMENT OF CASE

This appeal seeks reversal of the decision of the Court of Appeals for the Ninth Circuit finding that the Salt River Pima-Maricopa Indian Community Tribal Court could assert criminal jurisdiction over Albert Duro, a nonmember Cahuilla Indian. The opinion of the Ninth Circuit conflicts with a recent

case from the Eighth Circuit and is inconsistent with several cases decided by this Court.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court held that Indian tribal courts do not possess criminal jurisdiction over non-Indians. In *Duro*, however, the two-judge majority of the Ninth Circuit panel found that tribal courts could exercise criminal jurisdiction over undefined categories of nonmembers of the tribe as long as they were Indians and possessed "significant contacts" with the tribal community. Nonmember Indians, rather than nonmembers generally, may be subjected to criminal jurisdiction by a foreign tribal government in spite of their apparent status as equal citizens with non-Indians.

The result reached by the Ninth Circuit is unfair, unworkable, and discriminatory in effect. It is inconsistent with leading precedent established by this Court.

A. Statement of Facts

Albert Duro was born in Riverside, California, on June 17, 1958. He is a United States citizen and a permanent resident of the State of California. He is an enrolled member of the Torrez-Martinez Band of Mission Indians. Mr. Duro was raised on private land outside of any reservation environment and has always been subject to California civil and criminal jurisdiction (Joint App. at pp. 3-11 and 60-63).

Mr. Duro is a Cahuilla Indian and a living remnant of a distinct ethnic and cultural group that has mixed and assimilated with the dominant cultures of southern California for over two hundred years. Cahuilla Indians, along with other Indians that lived in the mission establishment or under the care of the Franciscan Missionaries in California since the 1700's, have generally been referred to as "Mission Indians".

As a result of secularization of the missions by the Mexican government and then land grabbing by whites in southern California following the Treaty of Guadalupe Hidalgo (1848), many Indians lost their land. It was estimated that only 675

Cahuilla Indians survived by 1883. See the *Report of Jackson and Kinney on the Mission Indians*, S.Rep. No. 74, 50th Cong., 1st Sess. (1888); and W.T. Hagan, *American Indians*, at p. 96 (Univ. of Chi. Press 1961). Allotment of tribal lands further reduced the holdings of the Mission Indians to a meager level. The Torrez-Martinez band of Mission Indians (Cahuilla Indians) does not have a tribal court and exercises no criminal jurisdiction over its members.

Albert Duro met Debbie Lackey, a member of the Salt River Pima-Maricopa Indian Community, in California. She too was raised in southern California apart from her tribe. They lived together in California on an intermittent basis from 1980-1983, but also in Phoenix, Arizona, for a short period. (Joint App. at pp. 60-63). For a few months during 1984, Mr. Duro worked for PiCopa Construction Co. (owned by the Salt River Tribe) and lived on the Salt River Reservation with Ms. Lackey. Neither residency nor membership within the Salt River Tribe is required for employment with PiCopa Construction Co. (Joint App. at pp. 62-63).

Albert Duro was arrested near his home in California by federal agents on June 19, 1984. He and Wendel Lackey were charged with murder in the shooting death of Phillip Fernando Brown, a member of the Gila River Indian Tribe, by federal indictment dated July 25, 1984. The indictment was dismissed without prejudice upon request of the United States Attorney on September 17, 1984. [Joint App. at pp. 5 (Verified Petition), 61 (Stipulation of Fact), and 64-65 (Memorandum and Order of District Court)].

Mr. Duro was then turned over to the custody of the Salt River Pima-Maricopa Indian Community (hereinafter referred to as the "Salt River Tribe" or the "Tribe") on September 19, 1984 (Joint App. at pp. 60-61). He was charged with unlawful "discharge of firearms" (Joint App. at p. 28), an offense which allegedly occurred after he left the reservation and terminated employment with PiCopa Construction Co.

The Salt River Reservation was established by Executive Order dated June 14, 1879, which amended an earlier order of

January 10, 1879. It established a reservation for the Pima and Maricopa Indians (Joint App. at pp. 4 and 19-22).

B. Tribal And District Court Proceedings

A motion to dismiss the tribal complaint was denied by the Salt River Pima-Maricopa Indian Community Court (hereinafter referred to as the "Tribal Court"), on October 19, 1984 (Joint App. at pp. 30-35 and 42-49). The Tribe did not present any evidence to establish jurisdiction (Joint App. at p. 9). Mr. Duro filed a verified petition for a writ of habeas corpus and/or for a writ of prohibition on November 8, 1984, asserting, *inter alia*, that the tribal court did not have jurisdiction over him since he was not a member of the Salt River Tribe (Joint App. at pp. 3-63).

The factual allegations of the verified petition have not been denied by the Respondents. In addition, the parties filed a "Stipulation of Fact" with the District Court on November 21, 1984 (Joint App. at pp. 60-63).

The District Court issued its Memorandum and Order on January 8, 1985, which granted relief to Albert Duro (Joint App. at pp. 64-70). A judgment was entered in favor of Albert Duro on January 15, 1985 (Joint App. at p. 71). He was then released from the custody of the Salt River Tribe.

The District Court first ruled that the Salt River Tribe did not have criminal jurisdiction over Albert Duro, a nonmember Indian (Joint App. at pp. 66-67). Then, the Court reviewed the equal protection challenge to the Tribe's prosecution of nonmembers, as opposed to non-Indians, and concluded that "discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards" (Joint App. at pp. 69-70). The memorandum of the court emphasized the fact that nonmember Indians and non-Indians are treated the same by the Salt River Tribe.

C. Court Of Appeals Proceedings

On July 9, 1987, a divided panel of the Ninth Circuit reversed the decision of the District Court. The majority opinion, in a

case of "first impression," held that the Salt River Tribal Court did possess criminal jurisdiction over nonmember Indians. *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987) (Joint App. at pp. 73-86).

On June 29, 1988, the three-judge panel of the Court of Appeals issued an amended opinion. Both the majority and dissenting opinions were significantly revised. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988) (Joint App. at pp. 87-117).

Finally, on November 2, 1988, Mr. Duro's petition for rehearing was denied and his suggestion for rehearing *en banc* was rejected. Circuit Judge Kozinski, joined by Judges Leavy and Trott, issued a spirited dissenting opinion from the order denying rehearing *en banc*. *Duro v. Reina*, 860 F.2d 1463 (9th Cir. 1988) (Joint App. at pp. 118-132).

The majority acknowledged not only that the *Duro* case was one of "first impression", but also noted that the "issue concerns one of the uncharted reaches of tribal jurisdiction . . .". *Duro* at 1139. The majority opinion conceded that the exercise of criminal jurisdiction over nonmembers was "virtually without historical precedent", but extended jurisdiction, on a case-by-case basis, "to nonmember Indians who have significant contacts with a reservation." *Duro* at 1145.

The majority rejected the chorus of dissent from the Ninth Circuit, as well as, the unanimous decision of the Eight Circuit in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988), in concluding that the decisions of this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and its progeny, were not controlling.

The majority gave "little weight" to explicit language of the Supreme Court asserting that tribal courts do not possess criminal jurisdiction over nonmembers. The opinion resulted in criticism from other judges in the Ninth Circuit for rejecting, as imprecise "casual references", the language of controlling Supreme Court precedent addressing the status of nonmembers. *Duro* at 1141.

It is interesting to note that the amended opinion of the Court of Appeals held that "the federal criminal statutory scheme" is "more dispositive of this case" than Supreme Court precedent. 851 F.2d 1136, 1142. Yet, in the first *Duro* opinion, 821 F.2d 1358, 1362 (9th Cir. 1987), hardly any mention is made of the federal statutory scheme. The amended opinion essentially asserts that the General Crimes Act (Title 18 U.S.C. Section 1152), which grants broad criminal jurisdiction to the federal government on Indian lands, is pregnant with an affirmative grant of jurisdiction to tribal governments. But the majority opinion fails to reference any legislative history in support of its position.

In the end, the *Duro* majority extends criminal jurisdiction over nonmembers as a matter of policy. "We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations." *Duro* at 1145. In addition, the majority chose to vest jurisdiction with tribal courts in order to avoid a perceived "jurisdictional void." *Duro* at 1146.

Finally, the majority opinion of the Court of Appeals flatly rejected the equal protection claim asserted by Albert Duro. It asserted that Indian tribes "are political rather than racial groups." *Duro* at 1144. The majority reasoned that, "Who is an Indian turns on numerous facts of which race is only one, albeit an important one." The majority then concluded that Indians, including nonmember Indians, are not protected by the equal protection provisions of the Indian Civil Rights Act. The majority apparently based its legal conclusion on its finding that Albert Duro's classification as an Indian "is not purely a racial determination." *Duro* at 1144.

As noted, Judge Sneed filed a strong dissent. He did not find that the statutory scheme for federal jurisdiction over Indian country was dispositive of the issue of tribal jurisdiction. *Duro* at 1148-51. Instead, Judge Sneed insisted that applicable Supreme Court precedent was more persuasive than the analysis of the two-judge majority. His dissent recognized the discriminatory effect of the decision against nonmember Indians.

Judge Sneed concluded that "wise construction of the applicable law should reduce, if not eliminate, . . ." the possibility of discrimination. *Duro* at 1151.

The *Duro* opinion is also criticized by Judge Kozinski, joined by Judges Leavy and Trott, in dissent from the denial of rehearing *en banc*. 860 F.2d 1463 (9th Cir. 1988). Judge Kozinski criticizes the decision because it "overlooks clear Supreme Court pronouncements to the contrary . . .". 860 F.2d 1463 (9th Cir. 1988). Both Judges Kozinski and Sneed soundly criticize the majority opinion for not analyzing the underlying principles of Supreme Court cases more carefully.

Judge Kozinski feared, as did Judge Sneed, that the majority ignored the real possibility that nonmembers "may be treated in an unfair or discriminating fashion." 860 F.2d at 1469. He found that tribal assertion of criminal jurisdiction over nonmember Indians, as opposed to non-Indians, violates the equal protection provisions of the Indian Civil Rights Act, Title 25 U.S.C. Section 1302 (8).

The decision of the Court of Appeals for the Eighth Circuit in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988), was reached after the first *Duro* opinion was issued. *Duro* and *Greywater* create an irreconcilable conflict between the two circuits.

In *Greywater*, Chief Judge Lay wrote for a unanimous Court in concluding that strong precedent from the United States Supreme Court precluded the creation of criminal jurisdiction in favor of tribal courts over nonmember Indians. The Court held that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over enrolled members of the Turtle Mountain Band of Chippewa Indians.

Greywater reviewed controlling Supreme Court precedent and carefully analyzed the reasoning and underlying principles of the leading cases decided by this Court. The Court concluded that the exercise of criminal jurisdiction over nonmember Indians is "beyond what is necessary to protect the rights essential to the Tribe's self-government and inconsistent with the overriding interest of the federal government in ensur-

ing that its citizens are protected from unwarranted intrusions upon their personal liberty." *Greywater* at 493.

SUMMARY OF ARGUMENT

As a Cahuilla Indian and a permanent resident of the state of California, Albert Duro stands before this court on an equal footing with the non-Indian petitioners in *Oliphant*. Albert Duro cannot become a member of the Salt Rive Tribe. He cannot vote in tribal elections, hold tribal office, or participate as a juror in criminal trials held by the tribal court.

Oliphant held that Indian tribal courts do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. *Oliphant* at 208. The Court in *Oliphant* based its decision on the finding that Indian tribes possess inherent sovereignty to govern only their own members. *Oliphant* at p. 209. Nonmember Indians, as well as non-Indians, fall within the general class of nonmembers and thus are not subject to the jurisdiction arising from the sovereignty retained by Indian tribes. The application of *Oliphant* to nonmember Indians was expressed with unmistakable clarity by a unanimous Court in *United States v. Wheeler*, 435 U.S. 313 (1978). *Wheeler* reaffirmed the holding in *Oliphant* by stating that Indian tribes "cannot try nonmembers in tribal courts."

The inherent right of self-government retained by Indian tribes does not extend to external relations. However, the tribes continue to possess sovereign powers over its own members, "including the power to prescribe and enforce internal criminal laws", which "involve only the relations among members of a tribe." *Wheeler* at 326.

The decision in *Wheeler*, explicitly defining the limits of criminal jurisdiction of Indian tribes to its members, has been repeatedly emphasized by this court. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979), this court drew the line between permissible and impermissible state taxation of cigarette sales on the reservation on the basis of tribal membership. The Court reasoned that nonmember Indians "stand on the same footing as non-Indians

resident on the reservation." *Colville* at 161. In *Montana v. United States*, 450 U.S. 544, 564-65 (1981), the reasoning of *Oliphant* was highlighted:

Though *Oliphant* only determined inherent tribal authority in criminal matters, **the principles on which it relied supports the general proposition that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe.** (emphasis added).

The majority opinion in *Duro* found that this Court failed to employ any consistent rationale or principles in *Oliphant* and subsequent cases. It concluded that the use of the term "nonmembers" in cases following *Oliphant* were merely "casual references" deserving "little weight." *Duro* at 1142. The opinion in *Duro* ignored the chorus of dissent from both the Ninth Circuit as well as the Eighth Circuit in *Greywater*.

A historical review of the relations between federal, state, and tribal governments also reveals that non-Indians and nonmember Indians were treated similarly for purposes of criminal jurisdiction. The present statutes governing criminal jurisdiction over Indian country are a direct outgrowth of jurisdictional schemes devised by the early treaties and 19th century legislation. The jurisdictional approach of early statutes generally parallel the provisions of negotiated treaties and do not support the Ninth Circuit's decision in *Duro*.

A comprehensive review of treaties negotiated during the treaty period (1776-1871) affirmatively shows that federal jurisdiction generally applied to offenses committed by or upon "citizens" of the United States. Treaties also provided for federal jurisdiction over intertribal offenses. The early Trade and Intercourse Acts enacted by Congress parallel the provisions of Indian treaties, which continue as the backbone of Indian law.

The *Duro* decision not only overlooked clear Supreme Court precedent, but failed to review the complex history of Indian law. Instead, it construed the meaning of the General Crimes Act, Title U.S.C. Sec. 1152, in a vacuum, consistent with its

desire to extend the criminal jurisdiction of Indian tribes to nonmembers as a matter of "policy". *Duro* at 1145. However, the Supreme Court in *Oliphant* expressly stated that policy considerations concerning the distribution of criminal jurisdiction over Indian country resides with Congress, not the Ninth Circuit. *Oliphant*, at 212.

The majority opinion of the Ninth Circuit extended the criminal jurisdiction of Indian tribes on a case-by-case basis "to nonmember Indians who have significant contacts with the reservation" in order to further the policy of "improving law enforcement on reservations." *Duro* at 1145. The Ninth Circuit also reasoned that tribal governments must be provided with jurisdiction over nonmember Indians in order to avoid a "jurisdictional void".

The "significant contacts" test employed by the Ninth Circuit is unworkable and unfair. In *Duro*, the majority found "significant contacts" between Albert Duro and the reservation because of his social relationship with a female member of the Tribe, his short stay on the reservation, and temporary employment with a tribal enterprise. The "significant contacts" test will require a separate investigation of the accused's background, social relations, and employment in each case. Moreover, if the "contacts" are not "significant", then jurisdiction apparently lies elsewhere. The "jurisdictional void" envisioned by the Ninth Circuit has not been filled, but merely altered. The remedy fashioned in *Duro* is simply not a satisfactory resolution to the problem of criminal jurisdiction on Indian lands.

Finally, the assertion of criminal jurisdiction over a nonmember citizen, simply because he is an Indian, violates the equal protection provisions of the Indian Civil Rights Act. While nonmembers who are non-Indians are protected from the jurisdiction of Indian tribes, the *Duro* decision subjects nonmember Indians to criminal jurisdiction based merely upon their classification as Indians. The resulting distinction between nonmember Indians and non-Indians results in invidious discrimination against Indians on the basis of race.

As recognized by Judge Kozinski, the "one-Indian-is-just-like-another-Indian" approach to tribal jurisdiction is seriously misguided." *Duro*, 860 F.2d at 1464. The Ninth Circuit seeks to technically avoid the equal protection provisions of the Indian Civil Rights Act by classifying Indians as members of political entities rather than according to race. "[W]ise construction of the applicable law should reduce, if not eliminate," the existence of possible discrimination against nonmember Indians. *Duro* at 1136 (J. Sneed, dissenting).

The *Duro* decision unnecessarily denies nonmember Indians equal protection of the law with non-Indians in order to address the unsupported claim that equal treatment would create a "jurisdictional void", but then develops a minimum contacts test which leaves the void intact.

In an attempt to resolve law enforcement problems on Indian reservations, the majority opinion of the Ninth Circuit has formulated Indian policies that are inconsistent with controlling precedent from this Court and violate equal protection. Moreover, the Court of Appeals has attempted to legislate in the area of Indian policy that is expressly reserved to Congress. In the end, the scheme of criminal jurisdiction over nonmember Indians designed by the Court of Appeals is unworkable and unfair.

ARGUMENT

I. THE SALT RIVER TRIBAL COURT DOES NOT HAVE CRIMINAL JURISDICTION OVER ALBERT DURO, A NONMEMBER INDIAN

A. Tribal Courts Do Not Have Jurisdiction Over Nonmember Indians: *Oliphant* and Its Progeny

The decision in *Oliphant* specifically focused upon the status of the two petitioners, both non-Indians. Mark David Oliphant was arrested by tribal authorities and charged with assaulting a tribal officer and resisting arrest. Daniel B. Belgarde was arrested and charged under the tribal code with recklessly endangering another person and damaging tribal property. The petitioners argued only that the Suquamish Indian Provi-

sional Court did not have criminal jurisdiction over non-Indians. This Court agreed.

As a diminished "quasi-sovereign", Indian tribes retain the historically recognized right of governing their own members. On the other hand, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'."¹ The Court expressly noted that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant* at 208.

The intrinsic limits of tribal court jurisdiction summarized in *Oliphant* were recognized by the Eight Circuit in *Greywater*:

The Court concluded that tribal criminal jurisdiction over non-Indians was never included in the concept of inherent tribal sovereignty, and that even if Congress did not intend to take criminal jurisdiction over non-Indians away from Indian tribes, the exercise of that jurisdiction over non-Indians is incompatible and, thus, secondary to the sovereignty of the federal government in ensuring that its citizens "be protected . . . from unwarranted intrusions on their personal liberty." *Id.* at 210.

Greywater at 489. The analysis of this Court in *Oliphant* rejects not only the inherent, criminal jurisdiction of tribal courts over non-Indians, but over nonmembers generally. The *Oliphant* Court identified the nature of the limitations of tribal governments because of the overriding sovereignty of the United States by quoting from the concurring opinion of Justice Johnson in an early case dealing with the status of Indian tribes: "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." *Fletcher v. Peck*, 6 Cranch 87, 147 (1810) (emphasis added)." *Oliphant* at 209.

¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, at 208, quoting from *Oliphant v. Schlie*, 544 F. 2d at 1009 (9th Cir. 1976).

The Respondents cannot demonstrate that Congress has affirmatively delegated criminal jurisdiction over nonmembers to the Salt River Tribe. The interest of the United States in protecting its own "citizens", emphasized in *Oliphant* at pp. 204 and 210, applies with equal force to Albert Duro as it did to the non-Indian petitioners in *Oliphant*. As a United States citizen,² Albert Duro is entitled to the same constitutional safeguards and protection as non-Indians. See *Oliphant* at 211.

Oliphant emphasized the injustice that non-Indians would face if they were subjected to criminal trials not by their peers, nor by the customs of their people, but by a different race and culture, according to the law of an alien societal state. *Oliphant* at 210-211. Similar racial and cultural differences exist between different Indian peoples or tribes, as well as, between Indians and non-Indians. See *Greywater* at 493.

The cultural and legal diversity among the Indian tribes is in many instances as great as that between an Indian tribe and non-Indians.

K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727, at 755.

"To characterize all Indian tribes by any single generalization is factually misleading." *Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at p. 161 (1977). Methods of dispute resolution among various tribes are also "highly diversified, ranging from the sophisticated confederacy of the Iroquois—a precursor of the federal system—to informal systems of communal consensus." *Ibid.*

I would like to suggest, and I believe that testimony of other witnesses will bear out, that Indian tribes vary. They vary in their resources, in their size, in customs, degree of assimilation, and the establishment of one set of legal rules for any group of this character is unworkable.

² All Indians became citizens of the United States by an act of Congress in 1924. See Title 8 U. S.C. Section 1401(b).

Testimony of Arthur Lazarus, Jr., attorney for the Salt River Tribe and General Counsel of the Association on American Indian Affairs, Inc., before the Subcommittee on the Constitutional Rights of the American Indian, Senate Committee on the Judiciary (Committee Print) (1965).

Indeed, statistics indicate that the "Cahuilla Reservation" near Riverside, California, contains a total population of 56 people, of whom only 29 are "American Indians". *American Indian Areas and Alaska Native Villages: 1980, Census of Population, Supplemental Report*, U.S. Dept. of Commerce, Bureau of the Census. Anthropological data indicates that the Mission Indians never had a "tribal" form of government in the same sense in which the term applies to the greater part of the North American continent. *Acosta v. San Diego County*, 272 P.2d 92, 98 (Ca. App., 1954), citing Heizer and Whipple, *The California Indians* at p. 27 (Univ. of Calif. Press 1951). The unique history of the Mission Indians, including the Cahuilla Indians, sets them apart from any other tribe of Indian people.

If Albert Duro is subjected to a criminal trial by a jury of Salt River tribal members, it will not be a jury of his peers or a trial conducted according to his traditions or culture. Nonmembers, like Albert Duro, are not eligible for tribal membership in the Salt River Tribe. They cannot vote in elections held by the Salt River Tribe or hold elected office. See Article 2, Section 1 of the Constitution and Sections 3-1 and 3-2 of the Salt River Community Code (Joint App. At pp. 12-18 and 55-57). The tribal code provides that only members of the Salt River Tribe shall serve as jurors in tribal court. See Section 5-40 of the Salt River Community Code (Joint App. at pp. 58-59). The same impediments to a fair, constitutionally sound trial were significant in *Oliphant*. At 191, n.4.

Many decisions of this Court since *Oliphant* solidly support Mr. Duro's position in this case. The language of Justice Stewart in *United States v. Wheeler*, 435 U.S. 313, 322 (1978), asserts with unmistakable clarity that criminal jurisdiction of tribal governments extends only over tribal members:

It is undisputed that Indian tribes have power to enforce their **criminal laws against tribe members**. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to **tribe members and to enforce those laws by criminal sanctions**. (cites omitted; emphasis added).

Wheeler at 322. Although the Supreme Court held that both the Navajo Tribe and the United States, as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo Reservation, the Tribe could do so only because Wheeler was a tribal member. Since the *Wheeler* Court was faced with a claim of "double jeopardy," it was crucial to identify and explain the source and nature of criminal jurisdiction by Indian tribes. The nature and limits of "inherent tribal sovereignty" was the "controlling" issue presented in *Wheeler*. *Ibid*.

The *Wheeler* Court defined the attributes of tribal sovereignty, which diminished after their incorporation within the territory of the United States and their acceptance of its protection:

We have recently said: "Indian tribes are unique aggregations possessing all attributes of sovereignty over both their members and their territory. . ."

It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe . . . Although both of the treaties executed by the Tribe with the United States provided for punishment by the United States of Navajos who commit crimes against non-Indians, nothing in either of them deprived the Tribe of its **own** jurisdiction to charge, try, and punish **members** of the Tribe for violations of tribal law. On the contrary, we have said that "[i]mplicit in these treaty terms. . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." (cites and footnotes omitted).

United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

The term "nonmember" is used throughout the *Wheeler* opinion. The Ninth Circuit labeled its repeated use by a unanimous Supreme Court as "casual references" deserving "little weight". *Duro* at 1141. But, this Court's use of the term fits squarely with the principles underlying the decision in *Wheeler*. The meaning of *Oliphant* was emphasized accordingly:

Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such **implicit divestiture** of sovereignty has been held to have occurred are those involving the **relations between an Indian tribe and nonmembers** of the tribe. . . . And, **as we have recently held, they cannot try nonmembers in tribal courts.** (cities omitted; emphasis added).

Wheeler at 326. The power of the Navajo Tribe to punish its own members in *Wheeler* was predicated upon its retained sovereignty, rather than federal delegation. See *Wheeler* at 326-330. However, as harmonized by both *Wheeler* and *Oliphant*, retained criminal jurisdiction by Indian tribes cannot extend beyond tribal members.

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their **external relations**. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. **They involve only the relations among members of a tribe.** Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis added).

Wheeler at 326. It is worth noting that *Wheeler* was argued within two days of *Oliphant* and decided only sixteen days later. It is difficult to imagine that a unanimous Court in *Wheeler* simply misstated the holding in *Oliphant* as contended by the Ninth Circuit.

The Ninth Circuit rejected the explicit language of *Wheeler* as "indiscriminate dictum" 851 F.2d 1136, 1140. Judge Sneed found otherwise:

The lesson to be drawn appears to me to be clear. Retained sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate.

Duro at 1148. Judge Kozinski, as well as the unanimous court in *Greywater*, echos the conclusion of Judge Sneed:

Speaking precisely to the issue presented in our case, the court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts."

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort; it is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. Most important, when cited by the Court in support of its analysis in *Wheeler*, it is the only characterization of *Oliphant* that makes sense. . . . If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*. (cites and footnotes omitted).

Duro at 1465.

As stated by the Supreme Court in *Oliphant*, the assertion of criminal jurisdiction regarding external relations requires affirmative delegation of such powers by Congress. *Oliphant* at 208. Federal delegation of criminal jurisdiction to one Indian tribe to try and punish a member of another tribe, or any other person, necessarily involves a grant of power relating to external relations.³

³ The exercise of such power by the delegated tribe could logically preclude the federal government from prosecuting a more serious offense relating to the same matter. See *United States v. Wheeler* at n. 28. "That interesting question" was reserved by the Supreme Court.

The unanimous decision in *Wheeler*, explicitly defining the limits of criminal jurisdiction to tribal members, was emphasized in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979).

Although the Court was concerned with state and tribal taxing powers, it is significant that it drew the line between permissible and impermissible state taxation of cigarette sales on the reservation on the basis of tribal membership. Previous case law established that the state of Washington could not impose a sales tax over purchases by tribal members on the reservation. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). In *Colville*, the state was successful in arguing that the limitation on its taxing power is defined only by an infringement against tribal self-government or, in other words, with tribal membership. The Court necessarily defined the status of nonmember Indians on the reservation in order to resolve the contest for governmental authority between the state and tribal entities.

[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. Section 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. **For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.** (emphasis added).

Colville at 161. The Court held that nonmember Indians are not entitled to the same state tax immunity enjoyed by tribal members, even though they may be tribal residents. Instead, nonmember Indians and non-Indians were treated similarly. In sum, the extension of tribal sovereignty and the limitation on

the power of the states begins and ends with tribal membership.

The fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accoutrements of self-government in which a nonmember does not share.

Colville at 187. (Rehnquist, J., concurring in part). While the panel opinion of the Ninth Circuit virtually ignores *Colville*, the implications of *Colville* to Mr. Duro's case were succinctly noted by Judge Kozinski.

Although the Court was discussing a tribe's immunity from taxation, not its criminal jurisdiction, the Court was clearly drawing on a broader theory of tribal sovereignty. A tribe acts as a sovereign only with respect to its own members.

Duro, 860 F.2d at 1465. The Eighth Circuit in *Greywater* described "the principles of inherent tribal sovereignty" discussed in *Colville* as "instructive". 846 F.2d 486, 492 (8th Cir. 1988). Also see *Rice v. Rehner*, 463 U.S. 713, 720 (1983).

The same points were highlighted by this Court in *Montana v. United States*, 450 U.S. 544 (1980). It held that the Crow Tribe could properly regulate hunting and fishing by nonmembers on land belonging to the tribe or held by the United States in trust, but that it had no power to do so on lands that had passed from the tribe and were now held in fee by nonmembers (through allotment). See *Montana* at n. 8 & 9. The court relied upon the principles annunciated in *Wheeler* and *Oliphant*:

Thus, in addition to the power to punish tribal offenders, the Indian Tribes retained their inherent power to determine tribal membership, to regulate domestic regulations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Though *Oliphant* only determined inherent tribal authority in criminal matters, **the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.** (cites omitted; emphasis added).

Montana at 564-65. The sovereignty of Indian tribes encompasses criminal jurisdiction over its own members and civil jurisdiction over its own territory.

The reluctance of the majority opinion in *Duro* to analyze and follow controlling precedent from this Court is troubling.

The panel laments the lack of Supreme Court guidance on the questions before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labeling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has chartered a clear course through these waters, a course that the Eighth Circuit had no difficulty following. *Greywater v. Joshua*, 846 F.2 486 (8th Cir. 1988).

Duro, 860 F.2d at 1463-64 (J. Kozinski, dissenting from the denial of rehearing *en banc*.)

As the *Duro* court noted, the case raised a truly complex issue. Even so, one has difficulty reading the decision without feeling a sense of inadequacy in the court's rationale. Several aspects of the case are particularly troubling. First, the court's treatment of *Oliphant*, and its summary dismissal of Supreme Court language in post-*Oliphant* cases, overlooks those precedences underlying theme of limiting retained sovereign power as the source of tribal criminal authority.

MacKay, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?*, 1988 Utah Law Review 379, 391 (1988). Mr. Mackay concludes that "it becomes apparent that *Duro* was incorrectly decided and that, absent congressional approval, tribal criminal juris-

diction should begin and end with the enrolled members of the governing tribe." *Ibid.* at 381.

As Judge Kozinski concluded:

As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. . . . *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.

Duro at 1466.

B. Criminal Jurisdiction From A Historical Perspective: Indian Treaties And Early Statutes

Contemporary case law establishes that the extent of criminal jurisdiction held by Indian tribes ends where the reach of state governments begins, specifically with nonmembers. A historical review of the relationship between federal, state, and tribal governments also reveals that non-Indians and non-member Indians were treated similarly for purposes of criminal jurisdiction.

At the outset, it is important to note that the historical development of criminal jurisdiction over Indian lands is riddled with complex, conflicting, and contradictory laws and treaties, described by one prominent commentator as "chaotic" and "virtually irreconcilable".⁴ National Indian policy has undergone numerous shifts and directions in the course of

⁴ R.N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev., 503-583, at p. 505 (1976).

American history.⁵ Each of the federal statutes dealing with criminal jurisdiction were passed at different times and pursuant to widely varying philosophies. Yet, the present statutes are a direct outgrowth of jurisdictional schemes devised by the early treaties and 19th Century legislation.⁶

"Indian Law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

The backbone of Indian law was formulated through treaties negotiated by the federal government and various Indian tribes before the end of the treaty period (1776-1871), when Congress decided that no tribe could thereafter be recognized as an independent nation with which the United States could make treaties. See Title 25 U.S.C. Section 71. Although the federal government was most concerned with controlling violence between Indians and white frontierpersons, treaties gradually tended to treat non-Indians and nonmember Indians similarly. The concern of the United States with intra-Indian offenses increased with the Western movement and the closing of open space between the two cultures. Although provisions of treaties varied, the federal government generally exercised jurisdiction over offenses involving any of its own "citizens".⁷

⁵ W.C. Canby, Jr., *American Indian Law* at p. 9 (West Pub. Co., 1981).

⁶ R.N. Clinton, *Development of Indian Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L.Rev., 951-991, at pp. 957 and 961 and n.80 (1975).

⁷ Although many commentators have reviewed Indian treaties over the years, our research reveals that only one has reviewed them with the express purpose of discovering the treatment of nonmember Indians in comparison to treatment accorded to non-Indians. See K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*,

The first treaty negotiated by the United States was with the "Delaware Nation" on September 17, 1778.⁸ The treaty with the Delaware is unique in its use of language of international diplomacy. It provided that "neither party shall proceed to the infliction of punishments on the citizens of the other . . . until a fair and impartial trial can be had by judges or juries of both parties . . .". See Article IV. Subsequent treaties provide for federal jurisdiction over offenses committed between Indians and "citizens" of the United States.⁹

Ariz. State L. J., 727-756 (1980). Mr. Erhart concludes that "[t]reaty provisions during this same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians of crimes by or against tribal members." At 739-40.

⁸ All Indian treaties executed by Indian Tribes and ratified by the United States are contained in a chronological order in Vol. 11., C.J., Kappler, *Indian Affairs-Laws and Treaties* (1904).

⁹ Treaty with the Wyandots, Jan. 21, 1785, Art. 9, 7 Stat. 17 (The tribe shall "deliver up" any Indian who commits a robbery or murder on any "citizen" of the United States to be punished according to the ordinances of the United States); Treaty with the Cherokees, Nov. 28, 1785, Art. 6 and 7, 7 Stat. 18 (The tribe shall deliver any of its members who may commit robbery, murder, or other capital crimes on any "citizen" of the United States for punishment according to the ordinances of the United States. In turn, if any "citizen" of the United States, or person under their protection, shall commit such offense on any Indian, they shall be punished as if the crime had been committed on the citizen of the United States); Treaty with the Choctaws, Jan. 3, 1786, Art. 5 & 6, 7 Stat. 22 (similar to the treaty above); Treaty with the Chickasaws, Jan. 10, 1786, Art. 5 & 6, 7 Stat. 25 (same as above); Treaty with the Shawnees, Jan. 31, 1786, Art. 3, 7 Stat. 26 (Any Indians of the Shawnee Nation or other Indians residing in their towns who commit murder or robbery "or do any injury" to United States citizens shall be delivered to the United States. In turn, any citizen of the United States who injures any Indian of the Shawnee Nation or other Indians residing in their towns and under their protection shall be punished according to the laws of the United States.); Treaty with the Creeks, Aug. 7, 1790, Art. 8 & 9, 7 Stat. 37 (If any Creek Indian or person residing among them or who shall take

The exercise of federal jurisdiction over offenses by or against United States "citizens" is significant. If the provisions of the early treaties applied today, an alleged offense by Albert Duro on the land of another tribe would fall directly under federal jurisdiction.

However, treaty provisions soon began to provide for federal criminal jurisdiction over offenses committed by or against tribal members, as opposed to Indians generally, which involved United States citizens. "Consideration of subsequent treaty provisions makes clear the intent of Congress to assume jurisdiction over intertribal crimes." Erhart, *supra*, at p. 738.¹⁰

refugee in their nation that commits a robbery or murder or other capital crime on any "citizens or inhabitants of the United States", the tribe to which such offender may belong shall be delivered to the United States for punishment according to its law. The same shall occur against any "citizen or inhabitant of the United States" who commits a crime upon any peaceable and friendly Indian); Treaty with the Cherokees, July 2, 1791, Art. 10 & 11, 7 Stat. 40-41 (same as above). See K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, Ariz. State L.J. (1980) at n. 70.

¹⁰ Treaty with the Wyandots, Jan. 9, 1789, Art. 5, 7 Stat. 29 (The treaty provided for federal jurisdiction over offenses by tribal members against any citizen of the United States or by any United States citizens against tribal members.); Treaty with the Six Nations, Jan. 9, 1789, "Separate Article", 7 Stat. 34-35 (same as above); Treaty with the Six Nations, Nov. 11, 1794, Art. 7, 7 Stat. 46 (A complaint shall be made to the other party when individuals on either side engage in misconduct.); Treaty with the Wyandots, Aug. 3, 1795, Art. 9, 7 Stat. 52-53 (same as above); Treaty with the Sacs and Foxes, Nov. 3, 1804, Art. 5, 7 Stat. 85-86 (Individuals of either party who commit acts of misconduct against the other shall be punished by the laws of the United States.); Treaty with the Osages, Nov. 10, 1808, Art. 9, 7 Stat. 109 (same as above); Treaty with the Grand Pawnee, June 18, 1818, Art. 4, 7 Stat. 172 (The tribe agrees to deliver up "each and every individual of the said tribe" to the United States who violates any provisions of the treaty.); Treaty with the Noisy Pawnee, June 19, 1818, Art. 4, 7 Stat. 173 (same as above); Treaty with the Pawnee Republic, June 20, 1818, Art. 4, 7 Stat. 174 (same as above); Treaty

Treaties prior to 1825 demonstrate the United States' assumption of a role in intertribal disputes. . . .

The assumption of intertribal jurisdiction by the United States is even more explicit in treaties signed between 1825 and the end of the Indian treaty period in 1871. . . .

with the Pawnee Marhar, June 22, 1818, Art 4, 7 Stat. 175 (same as above); Treaty with the Quapaw, Aug. 24, 1818, Art. 6, 7 Stat. 177-178 (same as the Treaty with the Sacs and Foxes); Treaty with the Kansas, June 3, 1825, Art. 10, 7 Stat. 246-47 (similar to the treaties with the Quapaws); Treaty with the Ponkar, June 9, 1825, Art. 5, 7 Stat. 248-49 (same as above); Treaty with the Tetons, June 22, 1825, Art. 5, 7 Stat. 251 (same as above); Treaty with the Sioune and Ogallala Tribes, July 5, 1825, Art. 5, 7 Stat. 253-54 (same as above); Treaty with the Chayenne Tribe, July 6, 1825, Art. 5, 7 Stat. 256 (same as above); Treaty with the Hunkpapas, July 16, 1825, Art. 5, 7 Stat. 258 (same as above); Treaty with the Ricara Tribe, July 18, 1825, Art. 6, 7 Stat. 260 (same as above); Treaty with the Minnetaree Tribe, July 30, 1825, Art. 6, 7 Stat. 262-63 (same as above); Treaty with the Mandan Tribe, July 30, 1825, Art. 6, 7 Stat. 265 (same as above); Treaty with Crows, Aug. 4, 1825, Art. 5, 7 (same as above); Treaty with the Ottoe and Missouri Tribes, Sept. 26, 1825, Art. 5, 7 Stat. 278-79 (same as above); Treaty with the Pawnee Tribe, Sept. 30, 1825, Art. 5, 7 Stat. 280-81 (same as above); Treaty with the Maha Tribe, Oct. 6, 1825, Art. 5, 7 Stat. 283 (same as above); Treaty with the Choctaw, Sept. 27, 1830, Art. 6-8, 7 Stat. 334 (Any party of the Choctaws who commits acts of violence upon a United States citizen shall be punished by the laws of the United States. "All acts of violence" committed against "people of the Choctaw Nation either by citizens of the United States or neighboring tribes of red people" shall be referred to the President of the United States for punishment.); Treaty with the Comanche, Ioni, Anadaca, Cadoe, etc., May 15, 1846, Art. 7, 9 Stat. 845 ("[T]he tribe or nation to which the offender belongs shall deliver up the person" to the United States in the event of any murder or robbery of the citizen of the United. The same shall apply "if any subject or citizen of the United States shall commit murder or robbery on any Indian or Indians of said tribes or nations."); Treaty with the Rogue Indians, Sept. 10, 1853, Art. 6, 10 Stat. 1019 (Same as the Treaty with the Maha Tribe); Treaty with the Umpqua-Cow Creek Band, Sept. 19, 1853, Art. 6, 10 Stat. 1028 (same as above).

Treaty provisions during this same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians for crimes by or against tribal members. Thus, the federal government assumed jurisdiction over nonmember crimes.

There can be little doubt that these treaties contemplated equal treatment of nonmember Indians and non-Indians as regards crimes by or against tribal members. (footnotes omitted).¹¹

The first enactments by Congress concerning criminal jurisdiction over Indian Lands generally occurred in temporary Indian Trade and Intercourse Acts. The early statutes tended to reflect the substance of treaty provisions that were consummated during the late 1700's and early 1800's.

The Trade and Intercourse Act passed by the first Congress in 1790 provided for federal prosecution of United States citizens or residents who committed any crime or trespass on Indian land.¹² The Act theoretically provided protection for the Indians, but it also gave United States citizens and inhabitants the full protection of American law and procedure. The Act applied almost exclusively to white frontierpersons. Neither Indians nor blacks were then accepted as citizens.

The provisions of the Act of 1790 regarding criminal jurisdiction were reenacted in several subsequent Indian Trade and Intercourse Acts.¹³ In 1796, the Fourth Congress enlarged the

¹¹ K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz State L.J. at pp. 738-740.

¹² An Act to Regulate Trade and Intercourse with the Indian tribes, July 22, 1790, Ch. XXXIII, Section 5-6, 1 Stat. 138.

¹³ See the Act of March 1, 1793, Ch. XIX, Sec. 4, 1 Stat. 329; Act of May 19, 1796, Ch. XXX, Secs. 4-6 and 14-15, 1 Stat. 469-474; Act of March 3, 1799 Ch. XLV, Secs. 4-6 and 14-15, 1 Stat. 743; An Act for the Preservation of Peace with the Indian Tribes, Jan. 17, 1800, Ch. V, Sec. 4, 2 Stat. 6; An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers, March 30, 1802, Ch. XIII, Secs. 3-6 and 14-16, 2 Stat. 139.

law to reach outrages on both sides.¹⁴ The new law was designed to stop border incursions between Indians and whites.

The early Trade and Intercourse Acts generally provided that they would not affect any treaty then enforced between the United States and any Indian nation.

The Act of 1817 was the first predecessor of the General Crimes Act (current version at Title 18 U.S.C. Sec. 1152). It provided the confusing and broadly worded exception for crimes by Indians against Indians within any Indian boundary. The Salt River Tribe and the Ninth Circuit rely upon the language of Title 18 U.S.C. Sec. 1152 to argue that the decision of the District Court in Mr. Duro's case would create an unprecedented vacuum in the law. However, even ardent supporters of Indian sovereignty seem to recognize that Congress only meant to preserve tribal jurisdiction over intratribal disputes in a manner consistent with early treaties.

First, in accordance with the prevailing policy of permitting the tribe to resolve **intratribal matters**, the Act provided that federal jurisdiction would not "extend to any offense committed by one Indian against another, within any Indian boundary." . . . Additionally, the 1817 Act stated that it should **not be construed to negate** any contrary jurisdictional arrangements contained in **prior treaties**. The substance of the 1817 Act was incorporated into Section 25 of the first permanent Indian Trade and Intercourse Act in 1834. (emphasis added)¹⁵

Also see F.P. Prucha, *supra* note 14, at p. 194.

Professor Clinton points out that several treaties during the middle 1800's grant jurisdiction to the federal courts over crimes between Indians. "Such provisions failed to indicate whether coverage was limited to intertribal crimes or also

¹⁴ *Ibid.* Also see, F.P. Prucha, *American Indian Policy in the Formative Years—The Indian Trade and Intercourse Acts (1790-1834)*, at pp. 188-193 (Univ. of Neb. Press, 1962).

¹⁵ R.N. Clinton, *supra* note 6, at pp. 959-60.

included crimes occurring within a single tribe". However, Clinton cites the case of *Ex parte Crow Dog*, 109 U.S. 556, 566-567 (1883), for the proposition that the treaties did not grant federal jurisdiction over *intratribal* crime.¹⁶

Although the 1817 Act first expanded criminal jurisdiction over Indian lands with the exception of offenses committed "by one Indian against another", it was not until consideration of the Trade and Intercourse Act of 1834¹⁷ that the intentions of Congress were openly documented.

To be sure, the Acts of 1817 and 1834 significantly expanded federal jurisdiction at the expense of tribal sovereignty.

However, the exception to federal jurisdiction was not as it may first seem. The proposed legislation of 1834 envisioned not only the removal of all Indian tribes to the Western Territory, but also the formation of a "General Council" or new government over the "confederacy" of Indian tribes, which was to consist of elected members of the respective tribes in proportion to their numbers in the confederacy. The "General Council" would regulate intercourse between the different tribes, preserve peace, and punish offenders.¹⁸ The grandiose plan clearly called for punishment of intertribal offenses by the General Council and not by individual tribes. Even then, in

¹⁶ R.N. Clinton, *supra* note 6, at n. 29 and p. 956.

¹⁷ An Act to Regulate Trade and intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, June 30, 1834, Ch. CLXI, 4 Stat. 729. The transmission of the 1817 Act to the frontier also "seems to have been unusually faulty. Judge J. D. Doty in Michigan Territory did not know of its existence until 1827." See F.P. Prucha, *supra* note 14, at 193, n.9.

¹⁸ A Bill to provide for the Establishment of the Western Territory, and for the Security and Protection of the Emigrant and Other Indian Tribes therein, Secs. 7 and 9, H.R. Rep. No. 474, 23d Congress, 1st Session, at p. 36 (1834).

cases where the punishment was death, the United States President would be allowed to review the sentence.¹⁹

The proposed legislation consisted of three separate bills, which the Committee on Indian Affairs recommended for passage as a whole: the Western Territory bill, a bill to Provide for the Organization of the Department of Indian Affairs, and a bill for the Trade and Intercourse Act of 1834. The latter two bills passed, but the first bill establishing the Western Territory was defeated. The history of the bill is discussed in *Oliphant* at note 13.

The Trade and Intercourse Act extended federal jurisdiction over all offenses except those committed by "one Indian against the person or property of another Indian".²⁰ But the Act did not vest jurisdiction over intertribal offenses with the tribes, and thus only confirmed, at best, tribal sovereignty to the extent previously recognized. The proposed legislation provided for federal protection by the President to prevent aggressions or disturbances by one tribe against another.²¹

As the century progressed, tribal sovereignty continued to diminish, while federal jurisdiction into Indian country expanded. In 1871, Congress ended the treaty period by declaring that "no Indian nation or tribe . . . shall be acknowledged . . . as an independent . . . tribe or power with whom the United States may contract by treaty."²² Congress passed the

¹⁹ *Ibid.*, Sec. 9, at pp. 36-37, "The danger of leaving the punishment of death to the judgment of tribes who are not accustomed to measures of guilt, especially against others than members of the tribe, is too obvious to need comment."

²⁰ Act of June 30, 1834, Ch. CLXI, Sec. 25, 4 Stat. 733.

²¹ H.R. Rep. No. 474, *supra* note 18, at pp. 16, 37 and 91.

²² Act of March 3, 1871, Ch. CXX, 16 Stat. 566 (now 25 U.S.C. Sec. 71).

Major Crimes Act in 1885.²³ It granted jurisdiction to the federal and territorial courts to try crimes by and against Indians on reservations. It has been expanded several times and is now embodied within Title 18 U.S.C. Sec. 1153.

Congress then moved toward termination and allotment of Indian lands; and assimilation of Indian people into the economic, social, and judicial system of white society. The General Allotment Act of 1887²⁴ (or Dawes Act) provided for the division of tribal land into individual parcels and declared that allottees would then become United States citizens subject to the jurisdiction of state courts. See, generally, Otis, *The Dawes Act and the Allotment of Indian Lands* (U. of Okla. 1973); H. R. Rep. No. 1576 (Lands in Severalty to Indians), 46th Cong., 2d Sess. (1880); S. Doc. No. 12 (Report of the Dawes Commission), 34th Cong., 1st Sess. (1895). Subsequent acts by Congress continued to grant criminal jurisdiction to territorial courts.²⁵

Although allottees gained citizenship through the Dawes Act, all Indians were declared United States citizens by Congress in 1924. See Title 8 U.S.C. Sec. 1401(b). Pueblo Indians, including Mission Indians, were arguably vested with citizenship in 1848 by the Treaty of Guadalupe Hidalgo.

²³ Act of March 3, 1885, Ch. 341, Sec. 9, 23 Stat. 385.

Professor Clinton notes that passage of "[t]he Federal Crimes Act thus apparently reversed the long standing federal policy of permitting tribal self-government and punishment of intratribal offenses." See R.N. Clinton, *supra* note 6, at p 964.

²⁴ Act of Feb. 8, 1887, Ch. 119, 24 Stat. 388 (now 25 U.S.C. Secs. 331-358).

²⁵ Act of May 2, 1890 (Organic Act for the Territory of Oklahoma), Ch. 182, Sec. 12, 30-31, 26 Stat. 81, 88, 94-96; Act of June 10, 1896 (United States accepts jurisdiction over Sac and Fox Reservations from Iowa), Ch. 398, 29 Stat. 324, 331; Act of Feb. 2, 1803 (Act conferring jurisdiction upon circuit and district courts from South Dakota), Ch. 351, 32 Stat. 793.

The tribal lands of the Salt River Tribe were among those allotted.

Allotments as such today are a serious problem only on those reservations where allotted acreages comprise a large percentage of the total reservation land base. These are the San Xavier, Gila River, and Salt River reservations. What has happened through time is that non-resident heirs, not presently active members of reservation communities, outnumber resident owners of the land.

See T. Weaver, *Indians of Arizona*, at p. 40 (U. of Az 1974).

Although the Indian Reorganization Act of 1934 formally halted the alienation of Indian lands by allotment, the Act did not alter the historical distribution of criminal jurisdiction.²⁶

The trend against tribal jurisdiction continued with a flood of termination statutes during the 1940's and 50's.²⁷ The Select Committee of the Indian Affairs Committee of the House expressly continued the goal of enabling Indian people to take their place "in the white man's community on the white man's level."²⁸ Both houses of Congress and the Department of Interior shared the same views.²⁹ The broadest termination statute, Public Law 280,³⁰ granted criminal jurisdiction to six states, including California, and allowed several more to assume jurisdiction by legislation.³¹ The trend toward state jurisdiction (from federal jurisdiction) under Public Law 280

²⁶ Act of June 18, 1934, Ch. 576, 48 Stat. 984 (now codified in scattered sections of Title 25 U.S.C.).

²⁷ The Termination Acts are listed by: R.N. Clinton, *supra* note 6, at notes 91-95; T.W. Taylor, *The States and Their Indian Citizens*, at Appendix B., Table III, and pp. 48-62 (1972).

²⁸ H.R. Rep. No. 2091, 78th cong., 2d Sess. at p. 2 (1944).

²⁹ For a discussion of federal termination activity, see T.W. Taylor, *The States and Their Indian Citizens*, at pp. 48-62 (1972).

³⁰ Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588-59.

³¹ See R.N. Clinton, *supra* note 6, at n. 91, for a list of states that passed such legislation.

was altered by the Indian Civil Rights Act of 1968, which required tribal consent for assumption of jurisdiction.³²

Indian tribes have never been understood to possess, or delegated to have, criminal jurisdiction over nonmembers. The federal government policed disturbances between Indian tribes throughout the treaty period. Intertribal offenses were treated similarly with offenses by or against non-Indian citizens. In sum, nonmembers and their sub-class, non-Indians, have always been treated alike with respect to tribal criminal jurisdiction.

Congressional history demonstrates its understanding that tribal governments did not possess criminal jurisdiction beyond its own members.³³ Early cases display a similar under-

³² Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77-78, which is codified, in part, at Title 25 U.S.C. Secs. 1301-1303, 1321 (assumption by state of criminal jurisdiction).

³³(1) The Senate Committee on the Judiciary (1870) was instructed to examine the effect of the Fourteenth Amendment on Indian Tribes. The Committee reviewed federal legislation affecting Indians and the status of Indian tribes. Excerpts from the Committee's report show that Indian tribes, in the view of Congress, held wide jurisdiction over their own members, but not beyond that:

... and although the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they had lost their respective nationalities, their right to govern themselves . . .

From perusal of these statutes it is manifest that Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States. On the contrary, they have uniformly been treated as nations, and in that character held responsible for the crimes and outrages committed by their members, even outside of their territorial limits.

Their right of self-government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned . . .

Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members, except when such members were separated from the tribe to which they belonged [emphasis added throughout excerpts].

S. Rep. No. 268, 41st Cong., 3d Sess., at pp. 2, 9, and 10 (1870).

(2) Extensive hearings were conducted prior to the passage of the Indian Civil Rights Act of 1968 by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. The purpose of the Subcommittee's investigation was to determine the treatment accorded to individual Indians in light of their constitutional rights as American citizens.

The observations of the late Chairman, Samuel J. Erwin, Jr., were typical of the manner in which members of the Subcommittee discussed the exercise of tribal jurisdiction.

... it appears that a tribe may deprive its members of property and liberty without due process of law. . . . (emphasis added).

Summary Report of Hearings and Investigations, Committee Print, 88th Cong., 2d Sess., at p. 4 (1964). Reference was continually made to the "members" of the tribe, rather than Indians generally. For example:

Nevertheless, the Indian as a citizen has not been deemed to possess, in his relationship to his tribal government, the protections available to other American citizens in their relations with the State and Federal Government (emphasis added).

Ibid. Please note that the same type of reference was not used in relation to the State and Federal government.

The Subcommittee discussed the testimony of Judge Shirley Nelson, of the Hualapai Tribe (Arizona), to point out the potential problem faced by tribes that do not have jurisdiction over nonmember Indians:

Judge Nelson also referred to the limited power of tribal courts to try offenses committed by Indians who are not members of the tribe . . . The Federal authorities reasoned that . . . no crime had been committed which was subject to Federal prosecution. Therefore, the offender was allowed to go free; he could not be tried in the tribal court, which had no power to try a nonmember (emphasis added).

Ibid. at p. 8. Moreover, in response to the concern of the majority opinion of the Ninth Circuit against creation of a judicial vacuum, it is interesting to note that the Subcommittee had previously acknowledged the vacuum prior to the instant case.

Indians may be subject simultaneously to the jurisdiction of the three governments—Federal, State and tribal. Consequently, in many situations great confusion exists as to which government should exercise jurisdiction. Sometimes, a complete jurisdictional vacuum results in denial of due process and equal protection of the laws.

Although the subcommittee has investigated the general area of

standing on the part of the judiciary.³⁴

The reasons for treating the entire class of nonmembers, both non-Indians and nonmember Indians, the same for purposes of jurisdiction have continued to increase over the years. Various termination and allotment acts, complemented by assimilation and mobility, have brought the two groups closer together. Many Indian citizens, like Albert Duro, were raised on private land and under state jurisdiction. After governmental policies caused him to be like other citizens, it would be unfair, we submit, to treat him differently now. He should not be subjected to the criminal jurisdiction of a foreign Indian tribe any more than any other nonmember citizen.

constitutional rights, there is real need for a specific investigation and clarification of tripartite jurisdiction over Indian citizens.

Ibid. at p. 6.

(3) The Salt River Tribe presented "Resolution No. SR-441-65 of Salt River Pima-Maricopa Indian Community Tribal Council, Scottsdale, Ariz." to the 89th Congress in response to proposed legislation providing for the Indian Civil Rights Act:

Resolved . . . That it authorizes its attorneys, Royal D. Marks and/or Arthur Lazarus, Jr. to present testimony and take such other action . . . to the end that the proposed legislation allow for the preservation of tribal sovereignty and the adequate maintenance of law and order . . . as well as the extension of basic constitutional rights to tribal members. (emphasis added).

Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Constitutional Rights of the American Indian* (Committee Print) at pp. 78-79 (1965). At the time that the Indian Civil Rights Act was under consideration, the Salt River Tribe apparently had no thought of exercising criminal jurisdiction over nonmembers or extending constitutional protection to them.

³⁴See, e.g., *Fletcher v. Peck*, 6 Cranch 87, 147 (1810); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886); *In re Mayfield*, 141 U.S. 107 (1891); *Talton v. Mayes*, 163 U.S. 376 (1896); *Ex Parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878).

C. The Salt River Tribe Possesses Powers And Exerts Restrictions Inconsistent With Its Exercise Of Criminal Jurisdiction Over Nonmembers

Tribal courts essentially evolved within the framework of treatment accorded them by the federal government through the treaties and statutes discussed above. They have traditionally governed over internal affairs concerning their own members. In fact, the tie between tribal courts and tribal members is so strong that "unlike a state whose criminal jurisdiction extends only to crimes committed within its boundaries, the jurisdiction of a tribal court may at times include off-reservation conduct by tribal members."³⁵ See *Settler v. Lameer*, 507 F.2d 231 (9th Cir.1974). Also see 25 C.F.R. Sec. 11.2 (1984).³⁶ Tribal governments also maintain the unique right to exclude unwanted persons from its territory, including other American citizens without an adjudication of fault or wrongdoing. Felix S. Cohen's *Handbook of Federal Indian Law*, at p. 252 (1982 ed.); W. C. Canby, *American Indian Law*, at pp. 123-24 (West Pub. 1981); T. H. Weil, *American Indian Law*, Ann. Survey of Am. Law, at n. 46 (1979).

On the other hand, as recently summarized by Justice Stevens, tribal powers do not extend to nonmembers.

In sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined. The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." In *Oliphant* . . . the Court held that **tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservations.** (emphasis added).

³⁵See R. N. Clinton, *supra* note 4, at p. 559

³⁶25 C.F. R. Sec. 11.2 (1984) grants jurisdiction to the Court of Indian Offenses on the Hopi Reservation to enforce offenses against the peace and welfare of the tribe committed by tribal members off the reservation.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 170-71 (1982) (Stevens, J., joined by the C.J. Burger and J. Rehnquist, dissenting). The Salt River Tribe has affirmatively acted to define the limits of its jurisdiction exclusively to tribal members. The Salt River Community Code precludes all but tribal members from voting or holding elected office (Joint App. at pp. 55-57). Nonmembers are not allowed to sit on tribal juries (Joint App. at pp. 58-59).

The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion at 172-73 (Stevens, J., dissenting). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we, as good citizens, must live." *Wisberry v. Sanders*, 376 U.S. 1, 17 (1963). See R. L. Barsh and J. Y. Henderson, *The Road—Indian Tribes and Political Liberty*, Ch. 1 (Univ. of Calif. 1980).³⁷

³⁷ Important constitutional issues arise from criminal prosecutions in the context defined by the Salt River Community Code, including the Sixth Amendment right to be tried by an impartial jury of one's peers from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979); *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983). "[P]olitical subdivisions may not exclude persons from voting unless the exclusion is strictly necessary to serve a compelling [governmental] interest." *Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at pp. 585-86 (1977) (separate view of Vice-Chairperson), citing *Avery v. Midland County*, 390 U.S. 374 (1968); *City of Phoenix v. Koladzijski*, 399 U.S. 204 (1970). Even Congress may not be able to subject citizens to the criminal jurisdiction of tribal courts that are not authorized under Article III of the United States Constitution. *American Indian Policy Review Commission*, *supra*; *Reid v. Covert*,

D. Title 18 U.S.C. Section 1152 Is Not Pregnant With An Affirmative Grant Of Tribal Jurisdiction

The majority opinion of the Ninth Circuit does not point to legal precedent, congressional action, or historic tradition that vests the Tribe with criminal jurisdiction over nonmembers. The federal criminal statutory scheme and its treatment of crimes committed by Indians "is more dispositive of this case", according to the majority opinion, than "the reasoning of *Oliphant*" and its progeny. Its argument for tribal jurisdiction is also based upon the perceived incentive of this Court to avoid a jurisdictional vacuum with respect to nonmember Indians for offenses not included in the Major Crimes Act, as amended, Title 18 U.S.C. Sec. 1153. *Duro* at 1142-43 and 1145-46. The so-called "jurisdictional void", the majority opinion contends, is created by the exception to federal jurisdiction for "offenses committed by one Indian against another Indian . . ." embodied in Title 18 U.S.C. Sec. 1152. The Ninth Circuit speculates that if the tribes are not allowed to fill the void, no one will.

We do not agree that the noted exception in section 1152 (or its predecessors) is pregnant with an affirmative grant of tribal jurisdiction. Congress has failed to confer such jurisdiction upon tribal governments, although it has had ample opportunity to do so. The historical perspective shows that Congress rejected plans to vest criminal jurisdiction with Indian tribes in the Western Territory bill. Moreover, "[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader." F. S. Cohen's *Handbook of Federal Indian Law*, at p. 357, n. 79 (1982 Ed.). We submit that federal or state jurisdiction would more logically and fairly cover nonmembers generally, including nonmember Indians. In any event, no "void" will exist after this Court clarifies jurisdictional rules.

354 U.S. 1 (1957); *Kinsella v. United States ex. rel. Singleton*, 361 U.S. 234 (1960). These constitutional problems are inconsistent with the extension of criminal jurisdiction over nonmembers to the Salt River Tribe. The provisions of the Salt River Code are antithetical to an assumption of jurisdiction over Albert Duro.

A time weathered exception to federal jurisdiction on Indian lands under Title 18 U.S.C. Sec. 1152 has historically existed for offenses between "non-Indians" despite the all-encompassing language of the statute. Jurisdiction for these offenses resides in state courts. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

Albert Duro should be subject to the jurisdiction of state or federal courts in the same manner as non-Indians. He is subject to federal jurisdiction under section 1152 for offenses against "Indians" (or tribal members), but is subject to state or federal jurisdiction for offenses against "non-Indians" (or non-members.)

The *Duro* opinion notes that federal jurisdiction under Sections 1152-1153 exists when the accused person is an "Indian," citing *United States v. Antelope*, 430 U.S. 641, 642 (1977). It then insists, without more, that tribal courts may exercise jurisdiction over "Indians", including any member of a federally recognized tribe, on the same footing as the federal government.

The *Duro* decision, however, fails to mention that the federal government not only has "plenary" power over Indians, but also "special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians." F.S. Cohen, *Handbook of Federal Indian Law* at p. 207 (1982 ed). The same cannot be said for tribal governments.

Enough has been said to suggest that neither 18 U.S.C. Sec. 1152 nor 18 U.S.C. Sec. 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

I suggest the majority has misread 18 U.S.C. Sec. 1152.

To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently.

851 F.2d 1136, 1150-51 (9th Cir. 1988) (J. Sneed, dissenting).

The majority in *Duro* has erroneously construed Section 1152 by reading it without reference to the key historical landmarks used for charting an educated path through the jungle of Indian jurisdiction—namely, Indian treaties. Indeed, Indian treaties must be ratified by Congress and are equal in stature to legislation enacted in statutes.

Absent a contrary congressional expression of intent, the general rule with statutes and treaties is that the later in time governs any conflict between the two. Courts faced with asserted abrogations of Indian treaty provisions have required a clear showing of such legislative intent.

Erhart, *supra*, at 741, citing *Thomas v. Gay*, 169 U.S. 264, 271 (1898); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); and *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353 (1941).

Seemingly inconsistent treaties and statutes must be read and considered *in pari materia*. "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

Subsequent federal statutes have not explicitly abrogated treaty provisions calling for equal jurisdictional treatment of nonmember Indians and non-Indians in relation to crimes by or against tribal members.

If the term "Indian" in section 1152 means Indian generally, without regard to tribal affiliation, section 1152 would not provide for federal jurisdiction over intertribal offenses. The previously discussed treaty provisions do provide for federal jurisdiction over intertribal offenses,

however. Thus, under this interpretation of section 1152, either inconsistent jurisdictional rules apply to different reservations depending on the presence of jurisdictional treaty provisions or else section 1152 acts to impliedly abrogate such jurisdictional treaty provisions. On the other hand, interpreting "Indian" as merely a shorthand for a member of the tribe occupying the territory in question results in a uniform rule of federal jurisdiction over intertribal offenses which is consistent with the treaty provisions.

The most reasonable view would appear to be that Congress intended section 1152 to act as a general rule which would embody the same jurisdictional system as already applied to many tribes by treaty provision.

Erhart, *supra*, at pp. 742-45.

The majority opinion attempts to buttress its conclusion in favor of tribal court jurisdiction by asserting that a "jurisdictional void" will exist if it does not grant jurisdiction to tribal courts. Since *Duro* is a case of "first impression," however, it is quite clear that state authorities have not been given an opportunity to fill the supposed void. Even the majority opinion recognizes that it has, perhaps, made an unjustified prediction. Ultimately, it extends jurisdiction to tribal courts as a matter of "policy" because it disagrees with the Supreme Court's opinion in *Oliphant*.

We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as *Duro*. But increasing state authority in Indian reservations has its own disadvantages. We are fortunate to be able to avoid this dilemma. (cites omitted).

851 F.2d 1136, 1145-46 (9th Cir. 1988).

The majority avoided the "dilemma" by ignoring controlling precedent from this Court. It also ignored the mandate of *Oliphant* that policy considerations regarding jurisdiction over

Indian country are for Congress, not the Court of Appeals. *Oliphant* at 212. Judge Kozinski, joined by Judges Leavy and Trott, of the Ninth Circuit also found the prediction of the majority opinion wanting:

The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. . . . The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. (cites omitted).

860 F.2d 1463, 1466 n. 4 (9th Cir. 1988) (dissent from denial of rehearing *en banc*). The Eighth Circuit in *Greywater* recognized the impropriety of judicial legislation in favor of Indian tribes, but also noted the propensity for state courts to exercise criminal jurisdiction. *Greywater* at n.3.

The supposed "jurisdictional void" found by the Ninth Circuit remains in spite of its legislative efforts. It has, perhaps, shrunk the "void," but failed to fill it. If the nonmember Indian does not have "significant contacts" with the host reservation, then jurisdiction under *Duro* apparently lies elsewhere.

E. The "Significant Contacts" Test Is Unworkable and Unfair

The Ninth Circuit has concluded that jurisdiction by Indian tribes over nonmembers must be determined on a case-by-case basis, as long as the nonmember is another Indian, but only if the nonmember Indian has "significant contacts with a reservation". *Duro* at 1145.

The supposed "contacts" by Mr. *Duro* included: (1) a temporary stay of four months on the Salt River Reservation, which the two-judge majority of the panel erroneously referred to as "residence"; (2) the relationship between Mr. *Duro* and his girlfriend, Debbie Lackey, who is a tribal member, but who is

not a resident of the reservation; and (3) his temporary employment with PiCopa Construction Co., which is owned by the Salt River Tribe. 851 F.2d 1136, 1144 (9th Cir. 1988).

The "significant contacts" test is not workable. It will require a separate investigation of the accused's background, social relations, employment, etc., in every case. In many cases, it will take far more resources to investigate social "contacts" in order to establish jurisdiction than it will take to investigate the alleged criminal conduct.

Since the efforts of the *Duro* decision to resolve jurisdictional conflict is impractical and unworkable, it highlights the need for a comprehensive solution to the problems of criminal jurisdiction on Indian lands. However, as recognized in *Oliphant*, it is Congress, rather than the courts, that must address these jurisdictional problems.

The two-judge majority in *Duro* undoubtedly believe that extending the criminal jurisdiction of tribal courts furthers the "policy" and "legitimate goal of improving law enforcement on reservations." 851 F.2d 1136, 1145 (9th Cir. 1988). But similar arguments were rejected by the Supreme Court in *Oliphant*. 435 U.S. 191, 210-212 (1978).

-The "significant contacts" test will not fill the supposed jurisdictional void found by the *Duro* decision. State or federal courts will apparently still be called upon to exercise jurisdiction if only weak or insignificant "contacts" exist, in spite of the involvement of nonmember Indians. The new chapter of Indian law written by the majority opinion in *Duro* appears troublesome.

The "contacts" relied upon by the *Duro* opinion cannot form a logical basis for establishing criminal jurisdiction in favor of tribal courts. The "contacts" are fleeting, subject to widely varying interpretations, and pose a continuous threat to divestment of jurisdiction in each case.

Judge Sneed has suggested that federal jurisdiction over nonmember Indians should not apply under section 1152 for all offenses not otherwise included in the Major Crimes Act (Title

18 U.S.C. Section 1153). *Duro* at 1151. Indeed, since federal courts regularly handle offenses by or against Indians for all major crimes, the incremental increase in federal jurisdiction over offenses by or against nonmember Indians for non-major crimes would not be burdensome or novel. If one fears that state courts may be prejudicial against nonmember Indians, then federal courts may be favored. Federal jurisdiction is also consistent with past treaty provisions.

This court must decide whether the federal trust responsibility to Indians generally calls for federal jurisdiction over nonmember Indians or rather, in light of citizenship, state jurisdiction over nonmember Indian is adequate.

Upon reflection, we suggest that federal jurisdiction is appropriate. Federal jurisdiction is consistent with past treaty provisions and practice. If federal jurisdiction is no longer necessary in light of Indian citizenship and assimilation of nonmember Indians into the non-Indian culture, then Congress should provide for state jurisdiction. Legislative fact-finding and policy formulation is more suited to these questions than judicial decision making.

II. THE EQUAL PROTECTION PROVISIONS OF THE INDIAN CIVIL RIGHTS ACT ARE VIOLATED WHEN THE CRIMINAL JURISDICTION OF A FOREIGN TRIBE IS IMPOSED UPON SOME NONMEMBERS, SIMPLY BECAUSE THEY ARE INDIANS, BUT NOT UPON OTHER, SIMILARLY SITUATED NONMEMBERS, SIMPLY BECAUSE THE LATTER ARE NON-INDIANS.

Nonmember Indians face unlawful discrimination when they are subjected to the criminal jurisdiction of a foreign Indian tribe, while all other nonmember persons are protected from tribal jurisdiction, solely because of their status as non-Indians. In other words, the "equal protection" provisions of the Indian Civil Rights Act (I.C.R.A.) are violated when criminal jurisdiction is imposed against a person solely because he or she is an "Indian". See Title 25 U.S.C. Section 1302(8). As recognized by Judge Kozinski, the "one-Indian-is-just-like-

another-Indian approach to tribal jurisdiction is seriously misguided." *Duro*, 860 F.2d at 1468.

The burden of a racial distinction in this case cannot be denied. As conceded by the majority opinion, "Who is an Indian turns on numerous facts of which race is only one, albeit an important one." *Duro* at 1144. Somehow, however, the majority opinion concludes that racial discrimination does not occur if race was only one of the factors leading to the decision to discriminate.

In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. See *id.* (racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny); see also L. Tribe, *American Constitutional Law* Sec. 16-14, at 1472 (2d ed. 1988) ("any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny . . ."). Under strict scrutiny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong. (footnote omitted).

Duro, 860 F.2d at 1468 (J. Kozinski dissenting from the denial of rehearing *en banc*). The assertion of criminal jurisdiction against nonmember Indians, but not against any other nonmembers, cannot avoid a racial distinction or impact.

It is plain that Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race. (footnote omitted).

Simmons v. Eagle Seelatsee, 244 F.Supp. 808, 814 (D. Oregon 1965), *affirmed*, 384 U.S. 209 (1966). Similarly, a non-Indian cannot become an "Indian" by formal affiliation with or adop-

tion by an Indian tribe. See *United States v. Rogers*, 45 U.S. (4 How) 567, 572-73 (1846).³⁸

Traditional equal protection analysis has not generally applied to federal legislation favorable to Indian tribes.³⁹ In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld a federal statute granting an employment preference to Indians in the BIA. The Court noted that "an entire title of the United States Code (25 U.S.C.)" would fall if federal legislation favoring "tribal Indians living on or near reservations" was deemed unconstitutional discrimination. *Ibid.* at p. 552. "Indian preference" was justified by Congress' powers under the commerce clause and its relationship to tribes (quasi-sovereign political entities) as guardian-ward.⁴⁰

The I.C.R.A. does not fall within the type of "Indian preference" legislation accorded Indian tribes within the contemplation of *Mancari* and its progeny. To the contrary, Congress passed the I.C.R.A. to limit the "deprivation of Individual rights by tribal governments" and to confer constitutional rights and protections on American Indians as individ-

³⁸ Jurisdictional statutes which infringe upon fundamental rights or adversely affect "suspect classes" are subject to strict scrutiny. The classification must then be necessary to fulfill a compelling government interest in order to survive equal protection analysis. Suspect classifications include alienage, *Sugarman v. Dugal*, 413 U.S. 634, 642 (1973); national origin, *Hernandez v. Texas*, 347 U.S. 475, 482, (1954); and race, *Korematsu v. United States*, 323 U.S. 214, 216 (1944). A "rational basis" must justify classifications that are not inherently suspect. "Middle tier" scrutiny, however, has developed in recent years and applies most notably to classifications based on gender and illegitimacy. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (gender); *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy). Classifications must serve important government objectives and be substantially related to achievement of those objectives.

³⁹ The United States Constitution does not apply to Indian Tribes. *Talton v. Mayes*, 163 U.S. 376 (1896).

⁴⁰ Also see *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Antelope*, 430 U.S. 641 (1977).

uals.⁴¹ Congress has not given "special treatment" to Indian tribes through the I.C.R.A. It has acted to hold tribes accountable to all individuals under constitutional principles. Traditional "equal protection" analysis should apply.

The focus of *Mancari* on Indians as members of quasi-sovereign tribal entities, rather than as a racial group, also fails to dispose of the need for traditional "equal protection" analysis in this case. The prosecution of Albert Duro by the Salt River Tribe pits a nonmember Indian against a foreign tribe. Our case does not involve preferential treatment accorded to Indians or tribal members as opposed to non-Indians. It involves prejudicial treatment against a nonmember Indian, who is similarly situated to non-Indians. Moreover, under the equal protection clause of the I.C.R.A., Congress intended to provide special protections to nonmember Indians.

The purpose of legislation which singles out Indians should be viewed in the context of the trust relationship which was designed to protect Indians. The logic of *Mancari*, based on the federal guardianship of Indian tribes, is weakened when utilized to uphold prejudicial rather than beneficial treatment of Indians.⁴²

Also see F.S. Cohen, *Handbook of Federal Indian Law* at pp. 648, 657-58 (1982 ed.)

If *Oliphant* is read narrowly to apply only to non-Indians, rather than the larger class of nonmember persons, racial discrimination will result.

After *Oliphant*, an Indian who commits a crime against another Indian in Indian country is subject to trial and punishment in tribal court. A white offender who commits the same crime against the same Indian in the same Indian

⁴¹ Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Committee Print, 89th Cong., 2d Sess., at p. 23-24 (1966).

⁴² R.W. Johnson and E.S. Crystal, *Indians and Equal Protection*, 54 Wash. L.R. at p. 606 (1979).

country cannot be tried in the same forum. The white must instead be prosecuted in federal court. The distinction between the two offenders is essentially racial If the power of the United States to try and punish its citizens is overriding, jurisdiction in Indian country should be vested in the federal court with respect to all its citizens, Indian and non-Indian alike.⁴³

To be sure, "[t]he principal tenet of the equal protection doctrine is that persons similarly situated should be treated alike under the law."⁴⁴ Albert Duro, as a nonmember Cahuilla (Mission) Indian who grew up in California, is similarly situated to non-Indians. He cannot participate as a member of the "quasi-sovereign tribal entity", which was emphasized by the Supreme Court in *Morton v. Mancari*, 417 U.S. 535, 554 (1974). If this court finds him subject to the criminal jurisdiction of the Salt River Tribe, it will do so solely because of his ethnological status as an enrolled Indian.

The "equal protection" guarantee of the I.C.R.A. has been applied to unequal treatment taken by tribal governments in the past.⁴⁵ The District Court was correct in providing "equal

⁴³ T.C. Kelly, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian offenders*, Wisc. L.R. 537-569, at p. 564 (1979).

⁴⁴ R.W. Johnson and E.S. Crystal, *supra* note 42, at p. 590.

⁴⁵ *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), rev'd on other grounds, 436 U.S. 49 (1978) (Equal Protection was violated when the offspring of a mixed marriage in which the woman is a Santa Clara are disqualified for membership in the Santa Clara Pueblo, whereas the mixed marriage offspring of a male member suffers no such disability.); *Means v. Wilson*, 522 F.2d 833, 842 (9th Cir. 1975)), *cert. denied*, 424 U.S. 958 (1976) (intentional interference by the tribal election board with tribal members' right to participate in their government violated equal protection.); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1237 (4th Cir. 1974) (Tribal member was entitled to procedural due process and even-handed application of tribal customs, traditions, and formalized rules relating to the assignment of tribal land upon the death of her father.);

protection" of the law to Albert Duro as intended by the I.C.R.A.

As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them. We believe this concern parallels concerns raised over 150 years ago which compelled the United States to exercise its criminal jurisdiction over tribal members who committed crimes against nonmembers and to enforce peace among certain Indian tribes. We conclude the government's power to resolve intertribal disputes as evidenced by these treaties, exemplifies that the Indian tribes were without the necessary authority to enforce their own tribal laws against nonmembers. To do otherwise would contravene one of the principal reasons for the treaties; to insure peace among the various tribes.

Greywater at 493.

It must be remembered that one of the principal interests of the Pima Indians in the federal government was to provide protection against other tribes. W.T. Hagan, *American Indians* at p. 95 (Univ. of Chi. 1961). A real danger of discrimination against nonmember Indians continues today. The decision in this case will affect all Indian tribes and nonmember Indians throughout the country. For example, Navajo Indians waiting to be relocated from Hopi Partitioned Lands in northern Arizona [See Navajo-Hopi Indian Land Settlement Act of 1974, Public Law 93-531, Title 25 U.S.C. Sec. 640 (1982)] are being subjected to criminal prosecution by the Hopi Tribal Court in spite of the well known animosity between the two tribes and the fight between the tribes for dwelling space.

White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973) (The one-person, one-vote principle was applicable to tribal elections because of the equal protection clause of the Indian Civil Rights Act.).

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court. . . . It is my personal experience that these individuals have experienced a violation of their . . . right to trial by impartial jury. . . .

. . . .

I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.

. . . .

. . . Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land. . . . [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed. . . .

Testimony of Lee Brooke Phillips, Enforcement of the Indian Civil Rights Act; Hearing Before the United States Commission on Civil Rights at pp. 219-20. (Aug 13-14, 1987), quoted by

Judge Kozinski in *Duro v. Reina*, 860 F.2d 1463, 1469 (9th Cir. 1988).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

Duro, 860 F.2d at 1469 (J. Kozinski dissenting from the denial of rehearing *en banc*).

Since potential discrimination in this and other cases flow from a jurisdictional scheme impermissibly based, at least in part, on race or ethnic origin, then a denial of "equal protection" results.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed. The memorandum, order, and judgment of the District Court should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX**CONSTITUTIONAL AND STATUTORY PROVISIONS**

Although many statutes and treaties are cited throughout the text of this brief, the following provisions relate more centrally to the issues presented:

Title 18 U.S.C. Section 1152**Laws governing**

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Title 18 U.S.C. Section 1153 (as amended at the time that the case first arose)

Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the

laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Title 18 U.S.C. Section 1301

Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian Offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Title 25 U.S.C. Section 1302

Constitutional rights

No Indian tribe exercising powers of self-government shall

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and par-

ticularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Title 25 U.S.C. Section 1303

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Act of June 2, 1924, 43 Stat. 253, now codified at Title 8 U.S.C. Section 1401 (b):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled. That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

(7)
No. 886546

Supreme Court, U.S.
FILED
OCT 6 1989

JOSEPH E. GRANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,
Petitioner,
versus

**EDWARD REINA, CHIEF OF POLICE, SALT
RIVER DEPARTMENT OF PUBLIC SAFETY, SALT
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THE HON. RELMAN R. MANUEL, SR., CHIEF JUDGE
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**ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF OF RESPONDENT

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49 pp

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QUESTIONS PRESENTED

1. Does the fact that Albert Duro, an enrolled member of the Torrez-Martinez band of Mission Indians (Cahuilla) who worked and lived on the Salt River Pima-Maricopa Indian Community, is not an enrolled member of the Salt River Pima-Maricopa Indian Community deprive the Salt River Pima-Maricopa Indian Community of misdemeanor criminal jurisdiction over him?

2. Should well established "equal protection" rules concerning enrolled Indians be overruled by now characterizing status obtained by enrollment as the equivalent of inherent racial characteristics?

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No. 886546

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,
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versus

EDWARD REINA, CHIEF OF POLICE, SALT
RIVER DEPARTMENT OF PUBLIC SAFETY, SALT
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ON THE WRIT OF CERTIORARI
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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In 1984, Albert Duro was taken into custody of the Community Department of Public Safety and charged with the unlawful discharge of firearms within the boundaries of the Salt River Pima-Maricopa Indian ("Community"). The offense is a misdemeanor. In fact, the misdemeanor "unlawful discharge" was a shooting alleged to have caused the death of Philip Brown, a fourteen year old youth.

Duro then sought habeas corpus from the U.S. District Court on the basis that the Community had no jurisdiction over him solely because, although an Indian, he was not enrolled in the Community. The district court granted habeas corpus. Duro was released and disappeared. The Court of Appeals for the Ninth Circuit reversed. *Duro v. Reina*, 821 Fed. 1358 (9th Cir. 1987). Thereafter it amended its opinion. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988). It denied a rehearing and an *en banc* rehearing. *Duro v. Reina*, 860 F.2d 1463 (9th Cir. 1988). Duro remains at large not having surrendered himself to the Community Department of Public Safety.

STATEMENT OF FACTS

The Salt River Pima-Maricopa Indian Community, a federally recognized self-governing Indian Community under the Indian Reorganization Act of 1934, occupies a reservation in south central Arizona within the Phoenix metropolitan area which was established by the executive order of President Rutherford B. Hayes in 1879. (Joint App. Exhibit B at 20-21). The population of the Community consists of its enrolled members and other Indian people associated in the Community with them. (Joint App. Stipulation of Fact No. 4 at 61-66). In March of 1984 the Petitioner, Albert Duro, moved into the Community to live with a member of the Community at her family home. He resided in the Community until approximately June 15, 1984. (*Id.* No. 13 at 62) He was employed by Picopa Construction Company, a company

owned by the Community, from February 1, 1984 until approximately June 15, 1984. (*Id.* No. 14 at 62-63). On June 3, 1984 Albert Duro was arrested on alcohol and marijuana possession charges under the Community Code of Ordinances by the Community police department. (*Id.* No. 6. at 61). He entered a plea of guilty before the Community Court, was found guilty and sentenced to pay a fine. (*Id.*) On June 19, 1984 he was arrested under a federal indictment in California by federal agents and charged with the murder of a resident of the Community — a fourteen year old boy who was a member of the Gila River Indian Community. (*Id.* No. 7 at 61). The indictment was dismissed without prejudice in September of 1984. (*Id.*

No. 8 at 61) and soon thereafter Albert Duro was placed in the custody of the Salt River Community Police Department. (*Id.* No. 9 at 61). A criminal complaint had been filed against him charging him with violation of the Criminal Code of the Community in the use and discharge of a firearm, based on the same incident which was the subject of the dismissed indictment. (*Id.* No. 10 at 62). Albert Duro is an enrolled member of the Torrez-Martinez (Cahuilla) Band of Mission Indians, a federally recognized band of American Indians. (*Id.* No. 2 at 60). The criminal jurisdiction asserted by the Community through its Code of Ordinances is over any person otherwise subject to the jurisdiction of the Salt River Court. Salt River Community Code § 4-1(c) (1984). (Joint App. Exhibit K at 43). The petitioner is subject to the criminal jurisdiction of the Salt River Court as a member of a federally recognized Indian tribe whose association with the Salt River Pima Maricopa Indian Community encompasses significant elements of his life; where he worked, where he lived, and with whom he lived. Unfortunately, his relationship with the Community involved as well the death of another resident of the Community.

SUMMARY OF ARGUMENT

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes do not have the inherent jurisdiction to try and to punish non-Indians. The

holding was supported by an examination of the history of treaty relationships between the United States and Indian tribes, the pattern of federal jurisdictional legislation in regard to Indian country and decisions of the Court from the earliest days of the Republic which compelled the conclusion not only that Indian tribes had no inherent jurisdiction to try and to punish non-Indian offenders against their laws, but as to Indian offenders within Indian reservations "it is intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." *United States v. Rogers*, 4 How. 567, 571 (1846). Statutes enacted by the Congress take into federal jurisdiction some categories of crime committed by Indians within Indian country and explicitly leave to Indian tribes the jurisdiction of crimes between Indians. Except as federal legislation allows, and tribes consent, states have no criminal jurisdiction over crimes committed by Indians on Indian reservations.

No case decided by the court subsequent to *Oliphant* extends or modifies the holding in *Oliphant* so as to deny tribal jurisdiction over crimes committed by Indians in Indian country. Three post *Oliphant* decisions, *Rice v. Rehner*, 463 U.S. 713 (1983), *National Farmers Union Insurance Company v. Crow Tribes of Indians*, 471 U.S. 845 (1985) and *Brendale v. Confederated Yakima Nation*, ___ U.S. ___, 106 L.Ed.2d 343 (1989) set standards in regard to tribal jurisdiction generally that support respondents' position that unless the Congress has withdrawn tribal jurisdiction, a tribe has an interest under federal law to exercise its power of governance to prevent adverse impacts which are serious and can imperil the political integrity of the tribe. The protection of the lives and property of those who live within the tribal reservation, the prevention of criminality, is essential to the political integrity of Indian tribes and is a power which clearly preexisted American sovereignty and which has not been diminished by it.

Indian tribes have from time immemorial governed themselves and those who associated with them regardless of whether they were members of the tribe. The court has recognized in a series of cases stretching over one hundred and thirty years that it is the policy of Congress to leave to Indian tribes criminal jurisdiction of all controversies between Indians without distinction as to membership. The executive branch has consistently recognized that tribes have criminal jurisdiction over offenses committed by Indians on tribal reservations without distinction as to tribal membership. The Attorney General in 1883 recognized this principle and the Solicitor of the Department of Interior in a series of opinions in the 1930's and 1940 specifically ruled that tribes could exercise criminal jurisdiction over non-member Indians for offenses committed on the reservation. Felix Cohen in his monumental *Handbook of Federal Indian Law* (1942) found well settled the proposition that except where the federal government has taken jurisdiction "all offenses other than those remain subject to tribal law and custom and to tribal courts." The federal government has taken jurisdiction of certain major crimes and of crimes defined by federal law and assimilated into federal law from state enactments except offenses by one Indian against another Indian, offenses for which an Indian offender has been tried by the tribe and offenses over which by treaty the tribe has exclusive jurisdiction.

The effect of the decision below is to maintain a pattern of jurisdiction that has existed since before the imposition of American sovereignty. Upsetting this settled pattern of criminal jurisdiction would result in a jurisdictional void so that no government would have the authority to try and to punish such offenders and Indian people on Indian reservations would be subject to petty offenses and misdemeanors committed by persons beyond the reach of the law.

There is no Indian Civil Rights Act equal protection violation. The court has determined that treatment of

Indians in a way different from treatment of non-Indians does not amount to improper discrimination since the differing treatment is based on the special status of Indian people under the laws of the United States. Non-member Indians are and ought to be subject to the laws of the tribal reservations whose ordinances they have violated. Albert Duro should not have special status as against other Indian people who happen to be members of the Salt River Pima-Maricopa Indian Community. Albert Duro's status as an American Indian is based on his membership in a federally recognized Indian tribe. He may end that status and avoid the criminal jurisdiction of Indian tribes by removing himself from the membership rolls of his tribe.

ARGUMENT

- I. THE *OLIPHANT* DECISION DETERMINED THAT NON-INDIANS WERE EXEMPT FROM TRIBAL COURT CRIMINAL JURISDICTION AND THE AUTHORITIES CITED BY THE COURT RECOGNIZED TRIBAL COURT CRIMINAL JURISDICTION OVER INDIANS WITHOUT DISTINCTION.

During the hundred years following the adoption of the Constitution, federal authority over Indian tribes, through conquest, treaties, or passive occupation changed the nature of the sovereign power of Indian tribes excluding from that authority "those powers 'inconsistent with their status.'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, (1978). For that reason this Court held in *Oliphant* that, "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians". *Id.* at 212.

In *Oliphant*, this Court observed that it was the assumption of all that tribes had no criminal jurisdiction over non-Indians. *Id.* at 206. Treaties were entered into with Indian tribes which contained provisions to protect them against incursions by non-Indians. The effort after all was to promote peace between the Indian tribes and surrounding non-Indian communities. Depredation by non-Indian criminal elements could cause retaliation by the tribes. A typical treaty provision would guarantee "that any citizen of the United States, who shall do an injury to any Indian of the nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." *Id.* at 197, 198 n. 8. The lack of jurisdiction in Indian courts or among Indian authorities to try and punish non-Indian offenders carried with it the concomitant obligation on the United States to try and punish non-Indian offenders against the peace and tranquility of Indian country, and left undisturbed the tribe's inherent jurisdiction to try and punish Indian offenders. As was noted in *Oliphant*, Judge Isaac C. Parker "held that to

give an Indian tribal court 'jurisdiction of the person of an offender, such offender must be an Indian.'" *Id.* at 200 citing *Ex Parte Kenyon*, 14 F. Cas. 353 (No. 7, 720) (WD Ark. 1878).

Beginning in 1790 the Congress constructed a statutory framework of criminal jurisdiction in Indian country which has been refined over the years. The federal legislative scheme in regard to criminal jurisdiction in Indian country on the one hand asserts jurisdiction in federal court over certain major crimes committed in Indian country by Indians and on the other hand creates federal crimes out of state criminal enactments and extends federal crimes to Indian country when the crimes are committed by a non-Indian against an Indian or by an Indian against a non-Indian.¹ The assertion of jurisdiction in the Major Crimes Act does not exclude the jurisdiction of tribal courts over a crime defined by the tribal code arising out of the same transaction as the federal criminal proceedings. *United States v. Wheeler*, 435 U.S. 313 (1978). Crimes by non-Indians against non-Indians in Indian country have been held to be within the exclusive jurisdic-

1 The Federal Major Crimes Act, 18 U.S.C. § 1153, first enacted as the Act of March 3, 1885, Ch. 341, 59, 23 Stat 362, 385, makes certain enumerated offenses committed by Indians in Indian country crimes within the exclusive jurisdiction of the United States.

The Indian Country Crimes Act, 18 U.S.C. § 1152, makes all federal criminal laws applicable to Indian Country, except "offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." (The Indian against Indian exception existed in the predecessors of the Act since the Act of March 3, 1817, Ch. 92, 3 Stat. 383 §§ 1, 2.) The Assimilative Crimes Act, 18 U.S.C. § 13, originally acted as the Act of March 8, 1825, ch. 65 4 Stat. 115, Sec. 3, assimilates state laws into 18 U.S.C. § 1152 so as to make violation of them federal offenses. The Indian against Indian exception applies to 18 U.S.C. § 13 offenses. *Acuna v. United States*, 404 F.2d 140, 142 (1968). See also *Williams v. Lee*, 358 U.S. 217, 220 (1959) N. 5. "For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts."

tion of state courts. *United States v. McBratney*, 104 U.S. 621 (1882). In *State of Arizona v. Flint*, 157 Ariz. 227, 756 P.2d 324 (1988) (cert. den. June 26, 1989), the prosecution claimed state courts had concurrent jurisdiction with the federal courts over a crime committed by a non-Indian against an Indian in Indian country. The Arizona Court of Appeals noted that this Court in *United States v. John*, 437 U.S. 634, 651 (1978) held that the federal court jurisdiction under 18 U.S.C. § 1153 (the Major Crimes Act) is preemptive of state jurisdiction and held that the state had no jurisdiction over the offense. "If concurrent state jurisdiction does not exist under 18 U.S.C. § 1153, it seems likely that a similar result should obtain under 18 U.S.C. § 1152." *State of Arizona v. Flint*, 157 Ariz. at 231, 756 P.2d at 328.

The Indian Civil Rights Act of 1968, and its amendments, restrict the exercise of criminal jurisdiction by Indian tribal courts.² The Indian Reorganization Act of 1934 authorizes Indian tribes to enact constitutions subject to approval by the Secretary of the Interior which may contain within them authorizations for legislative bodies to create courts and define criminal offenses. Title 25 U.S.C. § 467. Beyond these Acts, the Congress has imposed no limitation upon the exercise of tribal court jurisdiction over Indians. Those offenses committed by Indians against the person or property of Indians not exclusively under federal jurisdiction are within the jurisdiction of Indian tribal courts.³ The states, of course, have no jurisdiction over crimes committed by Indians in

2 25 U.S.C. § 1301 - 1303 provide for habeas corpus relief in the District Courts for violation by a tribe of any of the enumerated rights.

3 "Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1975).

Indian country.⁴ Nor can such jurisdiction be assumed by Arizona or any other state without the consent of the United States. 25 U.S.C. § 1321(a) gives such consent subject to the "consent of the Indian tribe occupying the particular Indian country... which could be affected...". Additionally, such states would have to affirmatively remove any impediments created by an Enabling Act. Title 25 U.S.C. § 1324. This Court has noted: "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation... Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."

⁴ Those courts which have spoken have uniformly determined that states do not have criminal jurisdiction over Indians who commit crimes in Indian Country. "[S]tate courts... do not have jurisdiction of an offense committed by a tribal Indian in 'Indian Country'". *Application of Denetclaw*, 83 Ariz. 299, 303, 320 P.2d 697, 701 (1958). The State of Wisconsin has "no jurisdiction of crimes committed by tribal Indians, on Indian reservations." *Konaha v. Brown*, 131 F.2d 737, 738 (7th Cir. 1942). In the absence of specific congressional grant of authority the state has no jurisdiction over crimes by Indians within Indian country. *People v. Luna*, 683 P.2d 362, 364 (Colo. App. 1984). In the absence of congressional authorization for states to have jurisdiction over crimes by Indians in Indian country it is "the intention of Congress to leave the punishment of crimes not mentioned in the Act of 1885, or in other enactments peculiarly made applicable to Indians, to the tribes themselves." *State v. Rufus*, 205 Wisc. 317, 237 N.W. 67 (1931). See also *United States v. Kagama*, 118 U.S. 375 (1886); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir. 1977); *State v. Burnett*, 671 P.2d 1165 (Okla. Cr. 1983); *State v. Allan*, 100 Idaho 918, 607 P.2d 426 (1980); *State v. Smith*, 277 Or. 251, 560 P.2d 1066 (1977); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *White v. Schnecklan*, 56 Wash. 2d 173, 351 P.2d 919 (1960); *Application of De Marrias*, 77 S.D. 294, 91 N.W. 2d 480 (1958); *State v. Campbell*, 53 Minn. 354, 55 N.W. 553 (Minn. 1893).

Williams v. Lee, 358 U.S. 217, 220 (1959)⁵

In *Oliphant* the Court referred to its discussion of Congressional Indian criminal jurisdiction policy in *In re: Mayfield*, 141 U.S. 107 (1891), noting that,

The 'general object' of the Congressional statutes was to allow Indian nations criminal 'jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side'.

Oliphant, 435 U.S. at 204.

Oliphant quoted at length from a 1960 Senate committee report done in consideration of a proposed statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing: "One who comes on such lands without permission may be prosecuted under state law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.*" (emphasis in original) *Id.* at 205.

⁵ See also, e.g., *United States v. Sutton*, 215 U.S. 291, 295, 296 (1909) (Washington); *United States v. Sandoval*, 231 U.S. 28, 36-38, 40 (1913) (New Mexico); *United States v. Chavez*, 290 U.S. 357, 360, 365 (1933) (New Mexico); *Williams v. United States*, 327 U.S. 711, 714, 715 n.10 (1946) (Arizona); *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685, 687 n.3 (1965) (Arizona); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973) (New Mexico) and; *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 178 (1973) (Arizona) where the Court noted "a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians." and "in light of our prior cases, appellee has no choice but to make this concession. See, e.g., *Kennerly v. District Court*, 400 U.S. 423 (1971); *United States v. Kagama*, 118 U.S. 375 (1886)." *McClanahan*, 411 U.S. at 178 n.19.

Oliphant cited *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) for a description of the dependent sovereignty of Indian tribes in relationship to the United States. *Id.* at 209. *Rogers* dealt with the question of whether a non-Indian could by adoption into the tribe become an Indian and benefit from the Indian against Indian exception to the Indian Country Crimes Act. After determining that a person entitled to the exception must be ethnically an Indian, the Chief Justice noted what must have been the common assumption and understanding of the time: “[A]nd it is intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.” *United States v. Rogers*, 4 How. at 571.

Nor can it be understood from Mr. Justice Johnson’s concurrence in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) that he meant anything but “Indians” when he used the word “themselves” in the passage noted in *Oliphant*: “[T]he restrictions upon the right of soil in the Indians, amount...to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.” (emphasis in original) *Oliphant*, 435 U.S. at 209.

Oliphant reviewed the Court’s discussion in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), of whether, prior to the enactment of the Major Crimes Act, “federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land.” *Oliphant*, 435 U.S. at 210. *Crow Dog* determined that without Congressional enactment federal courts had no such jurisdiction. *Crow Dog* stands clearly for the proposition that without Congressional enactment jurisdiction of criminal offenses between Indians is “left to be dealt with by each tribe for itself, according to its local customs.” *Ex parte Crow Dog*, 109 U.S. at 572.

The local law of the tribe exception to the Indian Country Crimes Act (18 U.S.C. § 1152) exemplifies the

policy of the United States that offenses by Indians in Indian country are left to tribal adjudication unless, as in the Major Crimes Act, Congress has asserted federal jurisdiction or the tribal authority does not exercise such jurisdiction.⁶ Indians who are subject to the Major Crimes Act “shall belong to (the reservation where the offense occurred) or some other tribe...its effect is confined to the acts of an Indian of *some* tribe, of a criminal character, committed within the limits of the reservation”. *United States v. Kagama*, 119 U.S. 375, 383 (1886). (Emphasis supplied)⁷

While *Oliphant* stands for the proposition that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians”, (*Id.* at 212) this Court’s analysis supports as well the proposition that Indian tribes have the jurisdiction to try and to punish persons who are members of federally recognized Indian tribes and whose involvement with the tribal community signifies they are a part of that community. Albert Duro fits that test. Indeed, he fits it comfortably.

⁶ 18 U.S.C. § 1152 provides “This section shall not extend...to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe...”

⁷ This court’s observation in *Kagama* was made in the course of upholding the validity of the Major Crimes Act.

In no case subsequent to *Oliphant* did this court modify or extend its holding in *Oliphant*.⁸

II. THIS COURT'S HOLDINGS IN POST *OLIPHANT* CASES SUPPORT THE PRINCIPLES OF INHERENT SOVEREIGNTY UPON WHICH RESPONDENT'S POSITION IS BASED.

In *Rice v. Rehner, National Farmers Union Insurance Companies v. Crow Tribe of Indians*, and *Brendale v. Confederated Yakima Nation*, this Court dealt with the questions of a state's right to regulate on-reservation liquor sales, of the effect of the *Oliphant* reasoning on a tribe's jurisdiction over civil claims by an Indian against a non-Indian entity and of the right of an Indian tribe to impose zoning regulations on fee land within an Indian reservation. *Rice* held that the state had the right to regulate the sale of liquor on an Indian reservation:

8 The Court's notation in *United States v. Wheeler*, 435 U.S. 313, 326 (1978) that "they [Indian tribes] cannot try non-members in tribal courts. (citing *Oliphant*)..." was part of the characterization of tribal jurisdictional attributes. As in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1979); *Montana v. United States*, 450 U.S. 544 (1980); and in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) the characterization of the holding in *Oliphant* had no bearing at all on the decision of the court. In *Wheeler* nothing in the analysis would have required a different result if *Wheeler* had been a member of a tribe other than the Navajo. The Navajo tribe still would have had the right to exercise its inherent criminal jurisdiction over Indians separate from the exercise of the criminal jurisdiction of the United States. In *Colville* the question was not whether tribal jurisdiction is ousted by the state's imposition of its sales tax on non-member Indians within the tribal reservation, but whether that state authority existed side by side with tribal authority.

In *Montana* the question was not whether tribal law could be enforced on non-member Indians within the tribal reservation but whether tribal regulations could be enforced on the activities of non-Indians on fee land not owned by the tribe. *Montana*, 450 U.S. at 560 n.9. In *Merrion* there was no question raised of tribal criminal jurisdiction over non-Indians or non-members. In *National Farmers Union*, 471 U.S. at 853 and *Brendale*, 106 L.Ed. at 360, the Court noted that *Oliphant* stood for the proposition that tribal courts did not have criminal jurisdiction to try and to punish non-Indians for offenses committed on the reservation.

Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case.

Rice, 463, U.S. at 725.

So that where there is a tradition of sovereign immunity that favors the Indians and where there is no substantial impact beyond the reservation, the assertion of tribal sovereignty ought to be respected. Indeed, where as here, a crime is committed by an Indian against an Indian on a reservation, the assertion of tribal sovereignty to try the offender, and to punish him, if convicted, ought to be recognized. Especially is this so where as here, there is a strong tradition of tribal criminal jurisdiction over non-member Indians.

National Farmers Union determined that the *Oliphant* reasoning did not apply to the issue of civil jurisdiction over non-Indians:

Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.⁹

National Farmers Union 471 U.S. at 854.

9 See *Oliphant*, 435 U.S. at 204: "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."

The federal legislative scheme of criminal jurisdiction in Indian country specifically excludes crimes by an Indian against the person or property of another Indian except as to the specific offenses in the Major Crimes Act. As in *National Farmers Union*, there is here "no comparable legislation granting the federal courts jurisdiction..." over a criminal transaction not enumerated in 25 U.S.C. § 1153 in which the only participants are Indians and which occurs on an Indian reservation.

In *Brendale* this court reviewed the standard for determining whether an Indian tribe had jurisdiction to impose its zoning regulations on fee land within the reservation. Although addressed to the issue of regulation of such fee lands, the standards enunciated by the plurality in this Court form at least the outer limits of protection of the integrity of Indian tribes:

[T]he tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health and welfare of the tribe. But, ... that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe. (Emphasis supplied)

Brendale, 106 L.Ed.2d at 363. The Court then acknowledges that "the tribe's protectable interest is one arising under federal law..." *Id.* at 363.

The *Brendale* standard in the *Duro* context is a

threshold standard.¹⁰ It cannot be applied individually in each criminal case arising in Indian country. Whether that burglary or that assault or that illegal and dangerous discharge of a firearm ought to be tried in tribal court because the particular offense imperiled the "political integrity, economic security or the health and welfare of the tribe." Rather, the inability of tribal courts to try and to punish non-member Indian offenders in and of itself would create an impact that is demonstrably serious and one which must certainly imperil the political integrity, economic security and the health and welfare of Indian tribes.¹¹

The post *Oliphant* cases set standards under which it is evident that tribal jurisdiction over non-member Indians was not divested by the accession of American sovereignty. Such jurisdiction is not inconsistent with contemporary tribal status.

III. INDIAN TRIBES TRADITIONALLY AND IN MODERN TIMES HAVE RETAINED JURISDICTION TO TRY AND TO PUNISH NON-MEMBER INDIANS.

10 The *Brendale* standard follows from this court's previous observation in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982):

In sharp contrast to the tribes' broad powers over their own members, tribal powers over non-members have always been narrowly confined. The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564. (Emphasis supplied)

See also *Williams v. Lee*, 358 U.S. at 223: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations".

11 The practical impact of law enforcement in the wake of *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) is discussed by Pommersheim *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Arizona L.R. 329, 360 (1989)

(a) Prior to American Sovereignty Indian Tribes
Exercised Criminal Jurisdiction Over Non-Member
Indians

Communities which govern themselves, necessarily enforce the laws, rules and customs of the community upon all who come within the ambit of community life, or within the jurisdiction of the governing body.¹² It cannot be said that enforcement is limited to members of the community and non-members are therefore to be dealt with only by expulsion or if as an enemy of the community by harsher and different standards than those which are normally applied in criminal cases to community members. Most especially is this so in situations where communities or tribes, or some members of them, live in close proximity or in the territory of the other, and as neighbors not tribal enemies. One of the most extensive studies of Indian tribal law of the time prior to European contact and American sovereignty was written by the lawyer, Karl N. Llewellyn and the anthropologist, E. Adamson Hobel.¹³ They observed that Cheyenne police regulations controlled the alien as well as the tribal member.¹⁴ Indeed, the police control of the non-Cheyenne Indian was the

12 Although Mr. Duro has asserted that he is not to be considered an Indian for jurisdictional purposes and is subject only to federal and state criminal laws, (Pet. Brief at 38) he has not taken the step of removing himself from the rolls of the Torrez-Martinez Band of Indians (Cahuilla). To do that would end his juridical Indian status under the holding in *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (No. 14,891) (C.C. Neb. 1879), and would also end the benefits that that status accords. Notwithstanding Duro's assertion that his tribe has no criminal jurisdiction over its members (Pet. Brief at 3), the tribe in which Mr. Duro is enrolled has the authority under federal law to enact criminal laws, enforce them, try offenders of them and punish such offenders. See Solicitor's opinion of November 14, 1978, *Criminal Jurisdiction*; P.L. 280, 6 I.L.R. H-1.

13 Llewellyn and Hoebel, *The Cheyenne Way, Conflict and Case Law in Primitive Jurisprudence* (1941).

14 *The Cheyenne Way*, at 238.

same as that imposed on a Cheyenne tribal member.¹⁵ Indian tribes have not lived in isolation from one another. Tribal members traded with other tribes and, of course, tribes made alliances for defense. Listed among the traditional allies of the Maricopa are the Mission Indians (Cahuilla).¹⁶ The Maricopas themselves sought and received refuge with the Pimas and settled in villages among them both on the Gila and Salt Rivers.¹⁷

(b) This Court has Always Recognized Tribal Jurisdiction Over Indians in General and not Members of a Particular Tribe.

For over 130 years this Court has spoken with a single voice on the question of the inherent jurisdiction of Indian tribes to try and to punish Indian offenders against tribal law. From *Rogers* in 1846 through *Crow Dog*, *Kagama* and *Mayfield* to *Antelope* in 1977, the policy of the Congress has been described by this Court as being one which has left to Indian tribal courts criminal jurisdiction of all controversies between Indians and which recognized that Indians, for this purpose, are not only "members of a tribe, but of the race generally — of the family of Indians; and it intended to leave them both, *as regarded their own tribe, and other tribes also*, to be governed by Indian usages and customs." (Emphasis Supplied) *Rogers*, 4

15 Two members of the Dakota Tribe, who had lived with the Cheyenne for some time violated a Cheyenne police regulation on the buffalo hunt and were punished as a Cheyenne tribal member would have been. It is related that the offenders were punished and then told "now you know what we do when anyone disobeys our orders...now you know we mean what we say." The punishment was followed by rehabilitation of the Dakota offenders as it would have been to Cheyennes. *The Cheyenne Way*, at 112-114.

16 Spier, *Yuman Tribes of the Gila River* at 42, 172 (1970).

17 Russell, *26th Annual Report of the Bureau of American Ethnology — 1904-05, The Pima Indians*, Government Printing Office, 1908, at 22.

How. at 573. The policy of Congress has not changed.¹⁸ Congress has not amended the Indian Country Crimes Act to remove the Indian against Indian exception, or, indeed the pre-emption exception accorded to tribal courts in the punishment of an Indian who commits a crime against a non-Indian. 25 U.S.C. § 1152. Certainly, Congress has the plenary power under the Indian Commerce Clause to sweep all crimes by or against Indians in Indian Country into the federal jurisdictional net. U.S. Const. art. I § 8, cl. 3. It has refrained from doing this for over 200 years. And this Court has recognized this to be the policy of the United States. "Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian Country are subject to the jurisdiction of tribal courts." *Antelope*, 430 U.S. at 643 n. 2.

Congress has dealt with Indian people and Indian tribes in a variety of ways and as to each of those ways it has been specific. If the congress wished to limit tribal criminal jurisdiction to each tribe's members it could have done that (having modified the word "Indian" in some statutes by the word "member" and in other statutes by other words¹⁹). In fact the policy has remained the same and this

18 The Report of the House of Representatives in regard to the Trade and Intercourse Act of 1834 reveals the understanding of the House as to the Indian against Indian exception

"It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, *of which the tribes have exclusive jurisdiction*; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens." H.R. Rep. No. 474, 23rd Cont., 1st Sess., at page 13 (1834). (Emphasis supplied)

Petitioner is not deterred by the plain language of the exception or the plain language of the House Report. "However, the exception to federal jurisdiction was not as it may first seem." (Pet. Brief at 28)

19 See Appendix A

Court has recognized its steadfastness over the years.²⁰

(c) The Executive Has Recognized the Criminal Jurisdiction of Indian Tribes Over non-Member Indians

In an opinion that antedated *Crow Dog* by a few months, the Attorney General advised the Secretary of the Interior that the federal courts had no jurisdiction over the offense of murder "of one tribal Indian by another, their tribes being different, and the murder having been committed within the reservation of a third tribe..." 17 Op. Atty. Gen. 566 (1883).

The Attorney General opined: "If no demand for Foster's surrender shall be made by *one* or *other* of the tribes concerned, founded fairly upon a violation of some law of *one* or *other* of them having jurisdiction of the offense in question, it seems that nothing remains except to discharge him." 17 Op. Atty. Gen. 566, 570 (1883) [Emphasis supplied].

In a series of opinions of the Solicitor of the Department of the Interior the question of tribal court criminal jurisdiction over non-member Indians was clearly resolved. In an opinion dated March 17, 1937, the Solicitor responded to the question of whether an ordinance adopted by the tribal council of the Confederated Salish and

20 Mr. Duro recognizes that the Trade and Intercourse Act excepted from its jurisdiction offenses committed by "one Indian against a person or property of another Indian" but then asserts that "the Act did not vest jurisdiction over intertribal offenses with the tribes." (Pet. Brief at 29) The learning of *Oliphant* is tribal powers are limited by their inconsistency with the predominant American sovereignty or by the removal of them by the Congress. It is not necessary for the Congress to vest in the tribes jurisdiction over non-member Indians when they already had that jurisdiction. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982):

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management... The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign...

Kootenai Tribes and which provided "...that the definition of the word 'Indian' for the purposes of the enforcement of the ordinances, would be 'any person of Indian descent who is a member of any recognized Indian tribe now under federal jurisdiction'..." was valid under federal law. The Solicitor determined that the definition in the ordinance was too broad because the tribal council's authority under its constitution was limited to enacting ordinances governing the conduct of members of the Confederated Tribes only. In an opinion dated March 17, 1937, the Solicitor suggested "that further consideration be given to the possibilities of enlarging jurisdiction limited by tribal constitution, as in the cases of this kind to members of the tribe where such enlargement may be desirable through constitutional amendment or possibly delegation of departmental authority." 1 Op. Sol. 736.

In his opinion dated October 25, 1938, the solicitor determined that the tribal court of the Rocky Boy's Tribe could be delegated jurisdiction over Indians who are not members of the Rocky Boy's Tribe but members of other recognized Indian tribes. The tribe's constitution did not at the time of the opinion provide for such jurisdiction and Solicitor Margold noted that "a gap in law enforcement has been created." 1 Op. Sol. 859. The position was reiterated in an opinion of February 17, 1939 in 1 Op. Sol. 872, involving the same reservation. On December 3, 1940, the solicitor, issued his opinion of the authority of the Navajo Tribe to ban use of peyote within the reservation. While the solicitor found that the ordinance had not been approved and adopted as a part of the law and order regulations for the Navajo Reservation and was therefore not in effect, he noted with particularity: "Several of the Indians are said to be non-members of the tribe. If the ordinance had been in effect, it would have embraced them under the definition of court jurisdiction in the law and order code." 1 Op. Sol. 1009.

In 1883, the Department of the Interior issued regulations calling for the establishment on each reservation of a "Court of Indian Offenses." The court, where it has

continued to exist, is substantially as established, except for the definition of particular offenses.²¹ The regulations distinguish between civil and criminal jurisdiction so that 25 CFR 11.2(a) provides that the court shall have jurisdiction of *criminal offenses* "when committed by *any Indian* within the reservation or reservations for which the court is established" (Emphasis supplied).²² 25 CFR 11.22 provides that the court "shall have jurisdiction of all [civil] suits wherein the *defendant* is a *member* of the tribe or tribes within their jurisdiction," (Emphasis supplied). While the Department of the Interior has taken special care in regard to Courts of Indian Offenses to limit the courts' civil jurisdiction to members of the tribe it extended its criminal jurisdiction to any Indian committing an offense within the reservation. The Department of the Interior, like the Congress, has applied some regulations to certain Indians and other regulations to all Indians.²³

Felix Cohen's review of federal Indian law supports the respondent's position.²⁴ In tracing tribal criminal jurisdiction he noted:

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction con-*

21 For the court's history, see Op. Sol. Dept. Int., Feb. 28, 1935; 1 Op. Sol. 531, 533. See also Hagan, *Indian Police and Judges* at 104 (1966).

22 The case that upheld the power of the Department of the Interior to create the court and the offenses it was to try, noted that Rule 9 of the original rules for the court of Indian offenses provided that the court shall have "jurisdiction of misdemeanors committed by Indians belonging to the reservation". *United States v. Clapox*, 35 Fed. 573, 576 (D.C. Ore. 1888).

23 See Appendix B

24 Cohen, *Handbook of Federal Indian Law* (1942) at 146.

tinues to this day, save as it has been expressly limited by the acts of a superior government. (Emphasis supplied)²⁵

After reviewing the Major Crimes Act, Cohen asserts: "All offenses other than those remain subject to tribal law and custom and to tribal courts."²⁶ Cohen noted that "the original tribal jurisdiction extends over visiting Indians"²⁷ and compares this continuing jurisdiction with the claim of jurisdiction over non-Indians which he relates "has been generally condemned by the federal courts."²⁸

Cohen concluded his review of tribal criminal jurisdiction in these words: "There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdiction over a vast area of ordinary offenses over which the Federal Government has never presumed to legislate and over which the state governments have not the authority to legislate."²⁹

Before American sovereignty was established over the Indian tribes, tribes has established governments. Under the impetus of the Indian Reorganization Act of 1934 constitutions were adopted by tribes establishing court systems similar to those in American counties. Who was subject to those court systems depended on the jurisdictional assertions of the tribe, restricted only by the lack of criminal jurisdiction over non-Indians and specific federal enactments. As we have seen, a tribe whose constitution and code allowed for criminal jurisdiction over Indians who were members of other federally recognized tribes was

25 *Id.* at 146.

26 *Id.* at 147.

27 *Id.* at 148.

28 *Id.*

29 *Id.*

accorded that jurisdiction by approval of its constitution and code by the Secretary of the Interior.

The relief sought by the petitioner is nothing less than the reversal of a pattern of juridical behavior which antedates American sovereignty and which has been sanctioned and fully recognized by the Executive and the Congress, as well as this Court.³⁰ The inherent criminal jurisdiction of Indian tribes over non-member Indians who are members of federally recognized Indian tribes has existed into modern times. It was not lost as being inconsistent with tribal dependent status. Congressional action has buttressed rather than restricted the tribes' inherent jurisdiction over such non-member Indians. Upsetting the settled pattern of criminal jurisdiction would result in a jurisdictional void of benefit only to petty criminals.³¹

30 This Court has observed that "[T]he commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight." *Oliphant*, 435 U.S. at 206. As has been shown, the presumption, as to non-member Indians, of Congress and the Executive is that Indian tribal courts *do* have criminal jurisdiction over non-member Indians.

31 Both the Hebrew and Greek cultures dealt with the right of the polity to impose its law on those who reside within the jurisdiction of the polity.

And when a stranger who resides with you would offer a passover sacrifice to the Lord, he must offer it in accordance with the rules and rites of the passover sacrifice. *There shall be one law for you, whether stranger or citizen of the country.* (Emphasis supplied)

Numbers 9.14

As the Lord spoke to Moses so the Laws spoke to (or through) Socrates.

For, having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good which we had to give, we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the way of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us laws will forbid him or interfere with him. Any one who does not like us and the city, may go where he likes, retaining his property. *But he who has experience of the manner in which we order justice and administer the state, and still remains has entered into an implied contract that he will do as we command him.* (Emphasis supplied)

Plato, *Crito* *51

IV. IF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT DOES NOT HAVE THE JURISDICTION TO TRY AND TO PUNISH ALBERT DURO FOR THE OFFENSE CHARGED, ALBERT DURO WILL NEVER BE TRIED AND PUNISHED FOR THAT OFFENSE.

Albert Duro, a member of a federally recognized Indian tribe and a resident and employee of the Salt River Pima-Maricopa Indian Community with personal, if not familial, ties to the Community, was charged with a crime by the Community for which he could not have been tried or punished in federal or state courts. The misdemeanor with which he was charged is not cognizable under the Major Crimes Act. Since the crime he is accused of committing resulted in the death of a fourteen year old Indian youth, a member of the Gila River Indian Community, the Assimilative Crimes Act and the Indian Country Crimes Act do not apply. Those three statutes do not differentiate between Indian people of different tribes.³²

32 So that in *Kagama*, this Court, in reviewing the constitutionality of the Major Crimes Act, noted:

The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and *the fair inference is that the offending Indian shall belong to that or some other tribe*... Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. (Emphasis supplied)

Kagama, 119 U.S. at 383.

See also *United States v. Burland*, 441 P.2d 1199 (9th Cir. 1971) in which the court held that a Salish and Kootenai tribal member living on the Flathead Reservation who committed a Major Crimes Act crime on the Fort Peck Reservation (of which he was not a member) could be tried in federal court; courts have gone further than we suggest by according Indian status without formal membership in any tribe based on significant involvement in a tribal community. *United States v. Ives*, 504 F.2d 935 (9th Cir. 1978), a Major Crimes Act case, in which the court held: "Enrollment or lack of enrollment is not determinative of Ives' status as an Indian." *Id.* at 953; and *Ex Parte Pero*, 60 F.2d 28 (7th Cir. 1938) in which the court held: "The lack of enrollment in the case of *Moore* is not determinative of status" *Id.* at 31.

Certainly, the definition of "Indian" in the Major Crimes Act is no different from what it is in the Indian against Indian exception language of the Assimilative Crimes Act or the Indian Country Crimes Act. Albert Duro would pass through the federal criminal jurisdiction net. He would not be entangled in the state criminal jurisdictional net since absent tribal consent under 25 U.S.C. § 1321(a) and state action under 25 U.S.C. § 1324, or specific congressional enactment Arizona does not have criminal jurisdiction over him.

Those courts which have dealt with the question have uniformly determined that states do *not* have jurisdiction over crimes committed by Indians who are not members of the reservation on which the crime was committed.³³

33 In *Cook v. State*, 215 N.W. 2d 832 (1974) the Supreme Court of South Dakota held that it was error for a lower court to deny post conviction relief to an Indian who was not a member of the Oglala Sioux Tribe to question the State of South Dakota's jurisdiction over him for a crime which he committed on the Pine Ridge Indian Reservation; In *State of Arizona ex rel Merrill v. Turtle*, 413 F.2d 683, 685, (9th Cir. 1969) the Court heard an appeal from the issuance of a writ of habeas corpus by a Cheyenne Indian who resided with his Navajo Indian wife on the Navajo Reservation and who was arrested on a warrant of the Governor of Arizona issued on the extradition demand of the Governor of Oklahoma. The question before the court was whether "Arizona's claim to extradition jurisdiction over Indian residents of the Navajo Reservation is subject to the tests of non-interference with the right of tribal self-government laid down in *Williams*..." to which question the Court concluded that "Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to Navajo's self-government."; and in *State v. Allen*, *supra*, where the Supreme Court of Idaho determined that notwithstanding the fact that the defendant was an enrolled member of the Quinault Tribe of Indians who resided on the Coeur d'Alene Indian Reservation, the mere residence on a reservation not of his tribe, does not emancipate him for purposes of jurisdiction and he "is not subject to state prosecution." *Allan* 607 P.2d at 429; the only state court that has determined that a non-member Indian living on an Indian reservation not his own was subject to state jurisdiction was the New York Court in *People ex rel Schuyler v. Livingstone*, 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924) in which the court relied on language from an earlier New York case; "It seems to me reasonably clear... that...that Onondagaes [are]...a nation dependent upon and owing allegiance to the State of New York, occupying lands over which the state has the right of preemption." *George v. Pierce*, 85 Misc. 105, 148 N.Y.S. 230, 235 (1914) which points out the significant difference that makes the New York case inapposite here. New York had criminal jurisdiction over reservation Indians from early times. 25 U.S.C. § 232 enacted July 2, 1948. 62 Stat. 1224 confirmed the jurisdiction of the state. Comment, *The New York Indians' Right to Self-Determination*, 22 Buffalo L. Rev. 985, 992 (1973).

This court, in *John*, recognized the Indian Reorganization Act's definition of "Indians": "The 1934 Act defined 'Indians' not only as 'all persons of Indians descent who are members of any recognized [in 1934] tribe now under federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'" *John*, 437 U.S. at 650.

Albert Duro is an Indian and his conduct resulted in the death of a fourteen year old Indian youth. He cannot be tried either in state or federal court for the offense charged in the Salt River Community Court. If he cannot be tried and punished by the Salt River Community Court, then he cannot be tried and punished. And Albert Duro does not stand alone as an Indian who lived and worked on a reservation not his own. Historically and in modern times Indian people have lived on reservations of their spouses when their spouses were of a different tribal polity. Interrelations between Indians of various tribal polities spring from the nature of federal involvement with Indian life at the time of occupation of the west by the United States. The creation of Indian reservations by the United States divided previously united Indian tribes.³⁴

34 The Salt River Pima-Maricopa Indian Community Reservation was created by Executive Order of January 10 1879, which was later modified by Executive Order of June 14, 1879, and those Executive Orders provided that the land described be "set apart for the use of said *Pima and Maricopa Indians*,..." On August 31, 1876, an Executive Order set aside certain land "as an addition to the Gila River Reservation in Arizona for the use and occupancy of the *Pima and Maricopa Indians*." The Pimas and Maricopas were two separate tribes who lived together after the Maricopas migrated to Pima territory from the Colorado River. They maintained separate cultures and languages. Spier, op. cit., at X. Not only were Pimas and Maricopas divided between federally established reservations, other Indian tribes were subject to the same federal policy. In southern California, the aboriginal lands belonged to groups of people who came to be known as "Mission Indians". These tribes included the *Cahuilla*, *Serrano*, *Luiseno*, *Diegueno* and *Kumeyaay*. These five tribes were placed on thirty-three separate rancheros or reservations. "Mr. Duro is a *Cahuilla* Indian and a living remnant of a distinct ethnic and cultural group..." (Pet. Brief at 2) The *Cahuillas* were placed on ten reservations. One of them was the *Torres-Martinez* Reservation established in 1876 on over twenty-five thousand acres. Shippek, *History of Southern California Mission Indians*, in W. Sturvenvant Ed., *Handbook of North American Indians*, Vol. 8, "California", 612, 613 (1978).

V. THE EQUAL PROTECTION RIGHTS OF ALBERT DURO WERE NOT VIOLATED

It is settled constitutional doctrine that the Congress may enact laws which accord different treatment to Indians than to non-Indians and which do not constitute invidious racial discriminations. Such laws may benefit individual Indians as in *Morton v. Mancari*, 417 U.S. 535 (1974), where a claim was made by certain non-Indian employees of the Bureau of Indian Affairs that employment preference for Indians violated certain anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 and deprived the claimants of property rights without due process of law in violation of the Fifth Amendment. Denying the claim this Court noted: "[P]reference does not constitute 'racial discrimination'. Indeed, it is not even a 'racial' preference. Rather, it is an employment criteria reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Morton* 417 U.S. at 553, 554. Such laws may work to the detriment of individual Indians yet benefit Indian tribes and advance federal Indian policy by providing for a system of criminal jurisdiction which promotes law and order on Indian reservations. Thus, in *Antelope*, this Court denied a challenge that the Major Crimes Act as applied resulted in improper racial discrimination because had a non-Indian been charged with the same offense and subject to prosecution under Idaho law, the quantum of proof to sustain the charge would have been greater than that required under federal law. The Court held that there was no violation of the Due Process Clause and noted that: "[F]ederal regulation of Indian affairs is not based upon impermissible classifications... respondents were not subject to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the *Coeur d'Alene* Tribe." *Antelope*, 430 U.S. at 646.

Fisher v. District Court, 424 U.S. 382 (1976) is, in principle, indistinguishable from *Duro*. In *Fisher*:

[T]he tribe adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act, ... a statute specifically intended to encourage Indian tribes to revitalize their self government... Acting pursuant to the constitution and by-laws, the tribal council of the Northern Cheyenne Tribe established the tribal court and granted it jurisdiction over adoptions 'among members of the Northern Cheyenne Tribe'.

Fisher, 424 U.S. at 387.³⁵

The community adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act and acting pursuant to the constitution and by-laws, the Community Council established the Community Court and granted it criminal jurisdiction over offenders against community law. All of these actions were approved by the Secretary of the Interior.

This Court viewed the exercise of self government by the tribe in *Fisher* as an exercise of power granted under the Indian Reorganization Act of 1934. So that the inherent jurisdiction to try and to punish non-member Indians is subject to the procedures authorized to be adopted by the tribal constitution and approved as tribal ordinance by the Secretary of the Interior as well as specific federal enactments such as the Indian Civil Rights Act of 1968.

In *Santa Clara Pueblo v. Martinez*, 436, U.S. 49 (1978), a case which dealt with a difference in treating membership rights based upon gender, the court found "respondents [at least one of whom was a nonmember child of the mother respondent], American Indians living on the Santa Clara reservation, are among the class for whose especial

³⁵ "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390

benefit [the Indian Civil Rights Act of 1968] was enacted." *Martinez*, 436 U.S. at 61, 74. the rights enumerated in the Act can be vindicated only by habeas corpus so that the "especial benefit" for "American Indians living on the... reservation" must be such as will protect them from incarceration resulting from criminal prosecutions in which the rights created by the Act are violated. The failure of a tribal court to allow a criminal defendant counsel of his choice, or deprivation of trial by jury are examples of such rights which are particularly set out. It is clear from *Martinez* that Congress determined to give such benefits to Indians without distinction for their protection. Such a Congressional determination is unassailable, fitting well within the power of Congress under the Indian Commerce Clause to make laws to especially deal with Indians.

The argument of petitioner that this case is burdened by racial discrimination is specious.³⁶ The assertion of jurisdiction is based solely on Indian status, not on race. No assertion of jurisdiction is made over an ethnic Indian who is not a member of a federally recognized Indian tribe. Under the Stipulation of Fact Albert Duro is a Cahulli Indian. He is an enrolled member of the Torrez-Martinez Band of Mission Indians, a federally recognized band of American Indians. (Joint App. at 60, No. 2) No question of race or ethnicity is before this Court. No blood quantum is asserted and that is for the simple reason that jurisdiction is claimed solely by virtue of petitioner's membership in an Indian tribe.³⁷ Jurisdiction is being asserted over petitioner for reasons other than race.

The long discussion of alleged violations of civil rights in the tragic Navajo-Hopi land dispute³⁸ is both beyond

³⁶ Pet. Brief at 44.

³⁷ Unlike membership in a race or an age group, one may resign from an Indian tribe. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (No. 14,891) C.C. Neb. 1879; *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856).

³⁸ Pet. Brief at 49, 50.

the record and irrelevant. Lee Phillips' complaint should have been addressed to the district court under 25 U.S. § 1302 to test the fairness of Hopi criminal court proceedings and selection of jurors. Instead a political argument is made. There is nothing in the record of this case that indicates any unfairness, any violation of petitioner's rights under the Indian Civil Rights Act of 1968. It is scandalous to assume that an Indian court would be any more likely to be biased against non-members than a state court would be against citizens of another state. There is a remedy under 25 U.S.C. § 1302 for violation of rights in a criminal proceeding as there are remedies for state court rights violation. "Potential discrimination" is remedied at the point of actual violation.

CONCLUSION

Albert Duro came to the Salt River Pima-Maricopa Indian Community's reservation, worked in a company owned by the Community and lived in a house owned by a member of the Community with a woman who was herself a member of the Community. He offended the laws of the Community and pled guilty in the Court of the Community. He was thereafter accused of discharging a firearm and thereby killing a young boy, a member of the Gila River Indian Community, who was a resident of the Community.

No government can exist, no community can survive, in the face of random violence, petty thievery and outrageous behavior. The laws of the Salt River Pima-Maricopa Indian Community were enacted to prevent and punish such activity. In this, the Community is no different than any other government. Its first obligation is to provide for the public safety and to promote domestic tranquility.

To the extent that the Community must rely on law enforcement from other governmental bodies, to that extent it is unable to assure the people of the Community the tranquility and order that every government must provide. The inability to provide for law and order strikes at the very heart of self government. The Community ought not to be a beggar for police protection and judicial services. It is now and ought to be the provider of such services.

Albert Duro ought not to be allowed to take advantage of the benefits which the Community offers and yet be able to disassociate himself from the obligations which living in a civilized society imposes on all.

The judgment below ought to be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTORY REFERENCES TO VARIOUS CATEGORIES OF INDIANS*

7 U.S.C. § 1985 (agricultural credit)

(e) (1) (D) (iii) (I):

“an Indian member of the Indian tribe that has jurisdiction over the reservation within which the real property is located;”

18 U.S.C. § 437 (trading with Indians)

(a) (1), (2):

“any Indian...”

(b) (2) (A), (B):

“any Indian...”

(c):

“any member of his or her particular tribe...”

18 U.S.C. § 1152 (offenses in Indian Country)

“offenses committed by one Indian against the person or property of another Indian...”

18 U.S.C. § 1153 (offenses in Indian Country)

“any Indian who commits against the person or property of another Indian or other person...”

25 U.S.C. § 181 (protection of Indians)

“No white man, not otherwise a member of any tribe of Indians who may...marry an Indian woman, member of any Indian tribe...”

25 U.S.C. § 375d. (descent and distribution)

“a member of the Cherokee, Chickawa, Choctaw or Seminole Nations or Tribes of Oklahoma or a person of the blood of said tribe...”

25 U.S.C. § 450b. (self-determination)

(a):

“‘Indian’ means a person who is a member of an Indian tribe;”

25 U.S.C. § 464 (transfer of restricted lands)

"any *member of such tribe...or any heirs or lineal descendants of such member or any other Indian person...*"

25 U.S.C. § 476 (tribal organization)

"*adult members of the tribe, or of the adult Indians residing on such reservation...*"

25 U.S.C. § 640a. (Navajo/Hopi rehabilitation)

"*members of the tribe and other qualified applicants...*"

25 U.S.C. § 677a. (distribution of Ute assets)

(b):

"*'Full-blood' means a member of the tribe who...*"

(c):

"*'Mixed-blood' means a member of the tribe who...*"

25 U.S.C. § 1481 (loan guaranties)

"*individual Indians...*"

25 U.S.C. § 1603 (health care)

(a):

"*'Indians' and 'Indian', unless otherwise designated, means any person who is a member of an Indian tribe ...except that [for certain purposes] such terms shall mean any individual who (1), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands or groups terminated since 1940...(2) is considered by the Secretary of the Interior to be an Indian for any purpose; or (3) is determined to be an Indian under regulation promulgated by the Secretary.*"

25 U.S.C. § 1814 (community college grants)

(b) (1):

"The Secretary shall not provide any funds to any

institution which denies admission to *any Indian student because such individual is not a member of a specific Indian tribe*, or which denies admission to *any Indian student because such individual is a member of a specific tribe.*"

25 U.S.C. § 1915 (child welfare)

(a):

"a preference shall be given...to a placement with (a) a member of the child's extended family; (2) other *members of the Indian child's tribe*; or (3) *other Indian families.*"

25 U.S.C. § 2205 (land consolidation)

(a):

"*nonmembers of the tribe or non-Indians...*"

(a) (1):

"*non-Indian or nonmember spouse...*"

(a) (2):

"*non-Indian or nonmember spouse...*"

(a) (3):

"*non-Indian or nonmember spouse...*"

42 U.S.C. § 2991(b) (health & welfare)

(a):

"*Indians who are not members of a federally recognized tribe.*"

42 U.S.C. § 5919 (energy research)

(v):

"*members of the affected Indian tribes...*"

* All emphases supplied

APPENDIX B

DEPARTMENT OF THE INTERIOR REFERENCES
TO VARIOUS CATEGORIES OF INDIANS*

25 CFR § 5.1 (employment preferences)

(a):

"Members of any recognized tribe now under Federal Jurisdiction;"

25 CFR § 11.2 (Court of Indian Offenses criminal jurisdiction)

(a):

"any Indian..."

(c):

"an Indian shall be deemed to be any person of Indian descent who is a *member of any recognized Indian tribe* now under Federal Jurisdiction..."

25 CFR § 11.3 (judges of Court of Indian Offenses)

(d):

"a person shall be eligible to serve as judge... only if he (1) is a *member of a tribe* under the jurisdiction of the said court;"

25 CFR § 11.18 (bail or bond)

"Bail shall be by two reliable *members of any Indian tribe*..."

25 CFR § 11.22 (Court of Indian Offenses civil jurisdiction)

"jurisdiction of all suits wherein the defendant is a *member of the tribe or tribes* within their jurisdiction..."

25 CFR § 11.22C (Court of Indian Offenses civil jurisdiction)

"jurisdiction of all suits wherein the parties...are *members*...and of all other suits between *members and non-members* which are brought before the courts by stipulation of both parties."

25 CFR § 11.74 (misdemeanors)

"any *Indian* who violates an ordinance..."

25 CFR § 41.11 (assistance for higher education)

(a):

admission to any such community college shall not be denied to any *Indian* student because such individual is *not a member of a specific Indian tribe* or because such individual is a *member of a specific Indian tribe*."

25 CFR § 101.20 (loans to Indians)

(c):

"In order for individuals to be eligible for loans from tribal funds, they must be *members of the tribe to which the funds belong*."

25 CFR § 103.8 (loan guaranties)

"Indians who are *members of tribes...which are not making loans to its members*...are eligible for guaranteed or insured loans."

25 CFR § 104.5 (contracting with Indians)

(a) (1):

"'Indian' means any *member of an Indian tribe*... who is residing on a Federal Indian reservation on land held in trust...or [on restricted land]."

25 CFR § 140.16 (contracting with Indians)

"Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a *member of the tribe*..."

25 CFR § 141.2 (business on certain reservations)

"The regulations of this part apply to all *non-members...who engage in retail business* on the above respective reservations."

25 CFR § 151.2 (land acquisitions)

(c):

“‘Individual Indian’ means:

- (1) any person who is an *enrolled member of a tribe*’
- (2) any person who is a *descendant of such a member...*;
- (3) *any other person possessing a total of one-half or more degree Indian blood of a tribe;*”

25 CFR § 162.5 (leasing of land)

(b) (2):

“tribal land may be lease at a nominal rental...for homesite purposes to *tribal members...*”

25 CFR § (Navajo grazing)

(b):

an objective of the regulations is to protect “the interests of the Navajo Indians from the encroachment of unduly aggressive and anti-social *individuals who may or may not be members* of the Navajo tribe.”

25 CFR § 244.11 (hunting on a certain reservation)

“There shall be no hunting by persons other than *enrolled members* of the Shoshone (sic.) and Arapahoe Tribes...on any Indian land of the Reservation. *Non-member spouses of tribal members* are not allowed to hunt.”

25 CFR § 256.2 (housing improvements)

(e):

“‘Indian’ means a person of Indian descent who is either of the following:

- (1) *an enrolled member...* of a tribe; or
- (2) *a person who is considered to be a member...*;
- (3) *a person of one-half or more degree Indian ancestry who is a descendant of a member of a tribe ...such persons are hereinafter referred to as ‘nontribal Indians’.*”

No. 88-6546

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police
Salt River Department of Public
Safety, Salt River Pima-Maricopa
Indian Community; and the HON. RELMAN
R. MANUEL, SR., Chief Judge of the Salt
River Pima-Maricopa Indian Community Court,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE SALT RIVER TRIBE DOES NOT HAVE CRIMINAL JURISDICTION OVER ALBERT DURO, A NONMEMBER INDIAN

Indian tribal courts possess inherent sovereignty to regulate internal affairs among their own members. "Implicit divestiture" of sovereignty occurred over "relations between an Indian tribe and nonmembers of the tribe . . .". *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978). Albert Duro is a non-member Indian. The Salt River Tribe cannot successfully assert criminal jurisdiction over him as part of its retained sovereignty.

The Salt River Tribe has never entered into a treaty with the United States. Its jurisdictional claim is not supported by a negotiated treaty or through Congressional delegation. Although the Salt River Tribe¹ has established a criminal code under the Indian Reorganization Act of 1934 (Title 25 U.S.C. Sec. 461 *et. seq.*), the Act did not give nor confirm criminal jurisdiction over nonmembers to the Salt River Tribe. The Act merely stabilized tribal powers vested "by existing law."

¹ The Salt River Tribe consists of 55,807.40 acres near Scottsdale, Arizona. The Tribe owns 5,301.10 acres in fee and holds 31,372.71 acres as trust land. Individuals own 24,434.69 acres on the Salt River Reservation, presumably through allotment. Approximately 12,104.51 acres of individually owned land is leased to third parties for agricultural or business purposes. The Tribe leases an additional 1,767.89 acres to third parties for commercial purposes. See the Annual Report of Caseloads, Acreages Under B.I.A. and Surface Leasing dated Dec. 31, 1988, Branch of Real Property Management, Dept. of the Interior, Phoenix Area Office of the B.I.A.

The majority of persons living on Indian reservations in this country are non-Indians. Census data reveals that only 49.2 percent of the population living on reservations are American Indians. 64.2 percent of the population of the Salt River Reservation are American Indians. Only eight percent are nonmember Indians, while over 35 percent are non-Indians. The substantial population of non-Indians, as opposed to nonmember Indians, poses a far greater threat to law enforcement problems on Indian reservations than the small population of nonmember Indians. See American Indian Areas and Alaska Native Villages: 1980, Census Population, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census. Cross deputization of officers has occurred between tribes, county and state law enforcement agencies in Arizona. Ariz. Office of Econ. Planning and Develop., *Critical Issues in Indian-State Relations* at p. 37 (1981). Mutual aid provisions have also been enacted. See A.R.S. Sections 11-952, 13-3872 thru 3874.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 n.5 (1978).

The Salt River Tribe's bare claim of territorial sovereignty, rather than personal sovereignty over its own members, begs for lawful authority. The Tribe acknowledges the effect of the Indian Civil Rights Act of 1968 and the Indian Reorganization Act of 1934, but boldly asserts that: "Beyond these Acts, the Congress has imposed no limitation upon the exercise of tribal court jurisdiction over Indians." Br. of Resp. at p. 9. The Salt River Tribe assumes that the power to try nonmembers is part of its retained sovereignty unless expressly extinguished. As this Court stated in *Oliphant*, however, "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." *Oliphant* at 208.

Indian tribes retain the "power to prescribe and enforce internal criminal laws", which "involve only the relations among members of a tribe." *Wheeler* at 326. They are prohibited from exercising powers of autonomous states relating to external relations or nonmembers because they are "inconsistent with their status" as a diminished quasi-sovereign. *Oliphant* at 208. The pivotal conclusion in *Oliphant* is equally applicable to nonmembers as a whole.

Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.

Oliphant at 208. Congress has failed to delegate such authority to the Salt River Tribe.²

While the Salt River Tribe now requests that its members be subjected to criminal jurisdiction of other tribes, it is interesting to note that one of the principal interests of the Pima Indians in the federal government was to obtain protection against the Navajos and Apaches. W.T. Hagen, *American Indians* at p. 95. (Univ. of Chi. Press, 1961). The federal gov-

² The Salt River Tribe has unsuccessfully attempted to obtain congressional authorization to exercise criminal jurisdiction over nonmembers. See H.R. 4900, 99th Cong., 2d Sess., 132 Cong. Rec. H8111-12 (Sept. 23, 1986). It appears that the Tribe amended its law and order code in 1980 to include criminal jurisdiction over "any person."

ernment has historically provided protection to Indian tribes by exercising jurisdiction over intertribal disputes and preserving peace among Indian tribes. See the Br. of Pet. at pp. 23-29. The Brief for the United States has passed over one of the most fundamental and enduring roles played by the federal government in its relation with Indian tribes, which was resolving intertribal disputes.³ The potential for animosity and prej-

³ Also see, e.g., *Report from the Office of Indian Affairs*, S.D. No. 1, 24th Cong., 2d Sess., at pp. 380-407 (1936) (A key role of the federal government was to preserve peace on the frontier between the several tribes and to establish an amiable relationship between them.); *Protection of Western Frontier*, H.D. No. 59, 25th Cong., 2d Sess. (1838) (Military posts are necessary in Indian territory to maintain peace among the Indians and to protect "feebler tribes against the stronger and more warlike nations that surround them which the United States are bound to do by treaty stipulations."); *Debates of Congress*, Gale and Seaton's Register, at pp. 4763-4779 (June 25, 1834). Congress understood the "customs of the tribe" relating to criminal jurisdiction to be that of a "blood-avenger" that utilized crude revenge to settle disputes. Cong. Record-House, January 9, 1885, at p. 934.

The fragmented and revisionist view of history set forth in the Brief for the United States cannot be sustained upon closer examination. The government's brief focuses upon Section 25 of the Trade and Intercourse Act of 1834, which was drafted in conjunction with the Western Territory Bill. Although the latter bill failed, the Act of 1834 established that all parts of the United States east of the Mississippi river shall be "deemed to be Indian Country." (Sec. 1). Section 19 provided that the federal government would "procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor" within Indian Country. The military force of the United States could be employed "in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes." (Sec. 19).

The Trade and Intercourse Acts were designed to deter violent clashes between white frontierpersons and groups of Indians. But, the provisions of the Trade and Intercourse Acts were never effectively enforced. See F.P. Prucha, *American Indian Policy in the Formative Years—The Indian Trade and Intercourse Acts (1790-1834)*, at pp. 193-203 (Univ. of Neb. Press 1962). The exception to federal jurisdiction for offenses by "one Indian against another" was understood to preserve tribal sovereignty allowing tribes to punish their own members.

Since it was generally admitted that offenses among the Indians within the tribe or nation were tribal matters that were to be handled by the tribe and were of no concern to the United States government, crimes committed by Indians against other Indians did not fall within the scope of the intercourse acts. The sovereignty of the Indian tribes, no matter how it might be circumscribed in other respects, was certainly considered to extend to the punishment of its own members.

F.P. Prucha at p. 211. Of course, the Trade and Intercourse Acts not only preserved, but could not and did not negate, contrary jurisdictional arrange-

udice between competing tribes and their members is probably greater than between Indians and non-Indians. See Br. of Pet. at pp. 48-50.

As set forth in Mr. Duro's opening brief, the principled reasoning of *Oliphant* and its progeny dictates the result in this case. *Wheeler* not only expressly stated that the holding in *Oliphant* applied to all nonmembers equally, it applied the rationale of *Oliphant* in a case where "the controlling question . . . [was] the source of [the tribe's] power to punish tribal offenders." *Wheeler* at 322.

It is important to note that *Oliphant* need not be re-examined, but only applied to a factual situation that is conceptually consistent with *Oliphant*. Indeed, the questioning by this Court of H. Barton Farr, III, who argued the case on behalf of

ments contained in Indian treaties. R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951-991, at p. 959 (1975).

Indian treaties, not discussed within the Brief for the United States, repeatedly provided for federal jurisdiction over intertribal or "member-nonmember crimes." K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J., at pp. 737-741. The Brief for the United States, at pages 10-15, fails to refer to any objective analysis of the Trade and Intercourse Act besides its own. The government's view is not only held in isolation, but ignores dozens of Indian treaties that were ratified by Congress and expressly preserved by the Trade and Intercourse Acts.

The Brief for the United States is also inconsistent with earlier, administrative decisions of the United States. See, *infra.*, at pp. a-16. It essentially asserts that Indian tribes enjoy "territorial sovereignty", rather than "personal sovereignty", which is contrary to an objective review of history as well.

The ambiguous dicta contained in *United States v. Rogers*, 45 U.S. (How.) 567 (1846), is not nearly as persuasive or directed to resolve the issue presented by Mr. Duro, we submit, as the language and rationale of *United States v. Wheeler*, 435 U.S. 313 (1978), and other post-*Oliphant* cases. *Rogers* merely decided that a non-Indian citizen of the United States could not escape the laws of the United States by becoming an adopted "member" of the Cherokee nation. "Indians are regarded as belonging to their race." Mr. Rogers could become a "member" of the Tribe, but not an "Indian". He could not escape federal prosecution. But, since he was accused of murdering another "white man", the exception for "Indian upon Indian" crimes did not apply in any event. *Rogers* at 570-72. *Rogers* did not examine the extent or nature of tribal jurisdiction. But *Wheeler* explicitly examined the nature and scope of tribal jurisdiction. In fact, *Wheeler* did so with the benefit of well over one-hundred years of additional jurisprudence in the field of Indian law.

the United States, shows that *Oliphant* was decided and written on the narrowest possible factual grounds, but that it addressed the conceptual issue of jurisdiction presented by Mr. Duro's case as well.

QUESTION: Well, it leaves it open, does it not? I mean, you concede that [an Indian tribe] is not a full sovereignty—as indeed you must.

MR. FARR: We do concede that it is not a full sovereignty.

QUESTIONS: And the question is, then does it include, as I say, the power to try and convict and punish **either non-members of the Tribe or non-Indians?**

MR. FARR: That is right. I mean, **I think that that is a question which the Court has to decide in this case.** [emphasis added].

Transcript of oral argument in *Oliphant v. Suquamish Indian Tribe*, Case No. 76-5729, before the Supreme Court of the United States on January 9, 1978, at p. 66. Counsel for the United States also admitted that tribal governments never possessed or exercised "territorial sovereignty". Transcript at pp. 67-68.⁴ As displayed later in this Reply Brief, Indian tribes possess personal, rather than territorial sovereignty over their own members.

The Respondent's and the government's reliance upon early cases decided during the formative years of our nation is misplaced. There was little reason to test the extent of criminal jurisdiction held by the Indian tribes, as noted in *Oliphant*, "because of the absence of formal tribal judicial systems." At p. 201. The early cases, therefore, do not specifically address this issue or articulate applicable rules of law with precise clarity. On balance, however, the language and reasoning of early cases

⁴ As emphasized by the Court during oral argument in *Oliphant*, the issue of law before the Court is whether or not tribal courts have criminal jurisdiction over nonmember Indians. The Court need not decide who has jurisdiction in the event that tribal governments do not have jurisdiction. Transcript at pp. 29-30. Also see the Br. for the U.S. in *Oliphant* at p. 10 (1977) ("Perhaps, at the end of the day, further legislation will be needed.").

support the proposition that criminal jurisdiction extends exclusively to tribal members.

In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "The restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors, [to the United States] from their markets; and the limitation upon their sovereignty amounts to the **right of governing every person within their limits except themselves.**" *Fletcher v. Peck*, 6 Cranch 87, 147 (1910) (Emphasis in *Oliphant*).

United States v. Oliphant, 435 U.S. 191, 209 (1978). Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) characterized Indian tribes as "domestic dependent nations" that had acknowledged their dependency on the United States for protection—a relation of a "ward to his guardian." *Ibid.*, at p. 17. Justice Baldwin stated that Indian tribes "were permitted to regulate their internal affairs in their own way . . . because Congress did not think proper to exercise" its exclusive right to do so. *Ibid.*, at p. 40. Exclusive federal power over Indian tribes was established by J. Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1932).

In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court found exclusive tribal jurisdiction over the offense of murder committed by one Sioux tribal member against another member on the Sioux tribe. Internal, "self-government" was defined as "the regulation by themselves of their own domestic affairs, **the maintenance of order and peace among their own members by the administration of their own laws and customs.**" *Ibid.*, at p. 568. (emphasis added). Federal jurisdiction was lacking, in part, because members of the Sioux tribe were not citizens of the United States and were not "constituted members of the political community of the United States." At p. 569. Mr. Duro presents analogous arguments against jurisdiction by a foreign tribe in this case.

Also see *Talton v. Mayes*, 163 U.S. 376, 379-80 (1986) (The Cherokee Nation exists as an autonomous body subject to the

paramount authority of the United States. "And from this fact there has consequently been . . . [tribal] power to make laws defining offenses and providing for trial and punishment of . . . [violators] when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation." (emphasis added). Also see *United States v. Kagama*, 118 U.S. 375 (1886); *In re Mayfield*, 141 U.S. 107, 115-116 (1891); and *Ex Parte Kenyon*, 14 F Cas. 353 (W.D. Ark. 1878). The building blocks of criminal jurisdiction over Indian lands are cited and discussed in *Oliphant* and its progeny.

Both the Brief of Respondent and the Brief for the United States conspicuously gloss over cases of fundamental importance, which were decided by this Court since *Oliphant*. For instance, the Respondent argues that the "notation in *United States v. Wheeler*, 435 U.S. 313, 326 (1978) that [Indian tribes] cannot try non-members in tribal courts . . . had no bearing at all on the decision of the Court." The Brief for the United States, at page 24, asserts that the "dicta" of *Wheeler* should not be "extended" to Mr. Duro's case as a matter of policy.

If *Wheeler* had not been a member of the Navajo Tribe, then the Tribe would not possess the inherent sovereignty to exercise criminal jurisdiction over him. On the other hand, delegated authority to prosecute a nonmember Indian by the Navajo Tribe would necessarily preclude prosecution by the federal government because of the double jeopardy clause of the Fifth Amendment.

The conceptual reasoning and principles annunciated by *Montana v. United States*, 450 U.S. 544 (1980), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1979) are compelling when applied to this case. Both the Respondent and the United States dismiss them in short order because they are fatal to their position before this Court. At the same time, the Salt River Tribe, amici tribes, and the United States rely upon carefully spotted "language" from other cases, but to no avail. They all fail to advance a convincing argument of criminal jurisdiction over nonmembers. The same policy arguments advanced by the Indian tribes and the United

States were rejected in *Oliphant* as falling within the province of Congress.⁵

The tribe surprisingly relies upon *Rice v. Rehner*, 463 U.S. 713 (1983). See Br. of Resp. at p. 14. A closer look at the *Rice* case shows that it clearly follows *Oliphant* and favors the position of Mr. Duro. Eva Rehner, a federally licensed Indian trader, contended that she did not need a state license to sell alcohol on the Pala Reservation in San Diego, California.

We begin by noting that there is nothing in the record to indicate that a federally licensed Indian trader like Rehner may sell liquor for off-premises consumption only to members of the Pala Tribe. Indeed, the State contends, and Rehner does not dispute, that Rehner, or any other federally licensed trader may sell liquor to Indian and non-Indian buyers alike. See Brief for Petitioner 81; Tr of Oral Arg 14. To the extent that Rehner seeks to sell to non-Indians, or to Indians who are not members of the tribes with jurisdiction over the reservations on which the sale occurred, the decisions of this Court have already foreclosed Rehner's arguments that the licensing requirements infringe upon tribal sovereignty. (footnote omitted).

⁵ The Respondent, amici tribes, and the government all argue that a jurisdictional void or vacuum will exist unless this Court legislates in favor of Indian tribes. The United States asserted that "tribal courts fill a hiatus" by prosecuting non-Indians in *Oliphant*. Br. for U. S. in *Oliphant* at p. 10. It also asserted that the question of whether or not state courts had jurisdiction over non-Indians should await until a later day. *Ibid* at 13.

It must also be noted that the government's position in this case was flatly rejected in *Oliphant* and in *Montana*. The concern of law enforcement as a matter of policy holds more significance when applied to non-Indians, who constitute the majority of residents on Indian reservations, than it does to nonmember Indians, who constitute a small minority of the population on Indian reservations. *Oliphant* squarely reserved policy questions concerning law enforcement to Congress. *Oliphant* at 212.

Other cases show that no lack of enthusiasm for the exercise of jurisdiction exists. The supposed jurisdictional vacuum will quickly be filled. See e.g., *United States v. John*, 437 U.S. 634 (1978); *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988); *State v. Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct. App. 1988), cert. denied, No. 88-603 (June 26, 1989); *State v. Atteberry*, 110 Ariz. 354, 519 P.2d 53, 54-55 (1974). If criminal jurisdiction is transferred to tribal courts, a wide void will remain. Only one-half of all tribal governments have tribal courts. We will lodge pertinent materials from the official record in the *Greywater* case with the Clerk of this Court prior to oral argument.

Rice v. Rehner, 463 U.S. 713, 720 (1983). *Rice* follows and punctuates both the holding and rationale of *Colville*. The recent case of *Brendale v. Confederated Yakima Indian Nation*, 106 L.Ed 2d 343 (1989), also emphasizes the lack of tribal jurisdiction over "relations between an Indian tribe and nonmembers of the tribe." The consistency of this Court in defining "tribal sovereignty" or the "internal relations of a tribe" with respect to its own members clearly supports the position of Mr. Duro in this case.

II. THE CRIMINAL JURISDICTION OR PERSONAL SOVEREIGNTY OF TRIBAL GOVERNMENTS IS RECOGNIZED BY HISTORICAL REFERENCES

Tribal authorities generally did not utilize penal sanctions prior to contact with Anglo-American laws and culture. The exercise of "criminal jurisdiction", including the imposition of fines and imprisonment, by tribal governments is a contemporary phenomenon. F Cohen, *Handbook of Federal Indian Law* at p. 335 (1982 ed.). Nevertheless, tribal courts exercise criminal jurisdiction over their own members based upon a concept of personal, rather than territorial sovereignty. The Respondents, amici tribes, and the government have failed to review historical references carefully.

Indeed, tribal courts exist in only about one-half of all tribal governments today. Shocking abuses on the part of tribal courts that do impose criminal sanctions has been noted by congressional investigations relating to the enforcement of the Indian Civil Rights Act of 1968, Title 25 U.S.C. Sections 1301 *et. seq.* See the Congressional Record-Senate, August 11, 1988, at pp. S11652-56, and March 5, 1989, at pp. S2186-92.

The Salt River Tribe asserts that "a series of opinions of the Solicitor of the Department of the Interior" clearly resolve the issue of tribal court criminal jurisdiction over nonmember Indians in favor of Indian tribes. However, a careful review of pertinent decisions from the Department of the Interior will unequivocally show not only that the Respondent is wrong, but that the government's historical analysis is faulty as well. See

Br. of Resp. at p. 21.⁶ Indian tribes possess inherent, criminal jurisdiction only over their own members.

In an extensive decision entitled "Powers of Indian Tribes" dated October 25, 1934, the Solicitor of the Department of the Interior summarizes the powers of local self-government retained by Indian tribes. It was understood that Indian tribes maintain the power to regulate domestic relations of its members and to "administer justice with respect to all disputes and offenses of or among the **members of the tribe**, other than the ten major crimes reserved to the federal courts" [emphasis added]. In addition, Indian tribes could "exclude from the limits of the reservation non-members of the tribe, excepting authorized Government officials . . .". 55 I.D. 14, 1 Op. Sol. 445 (1934).

Subsequent decisions of the Department of the Interior explain and solidify the conclusion of the Solicitor reached in 1934. It is interesting to note that the Respondent relies upon and the government ignores the decision of the Acting Solicitor dated March 17, 1937, relating to an ordinance adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes. See Br. of Resp. at pp. 21-22. The Acting Solicitor expressly stated that the Tribal Council has criminal jurisdiction only over members of the Confederated Tribes. He then suggested that further consideration be given to the possibility of enlarging jurisdiction by amending the tribal constitution "or possibly delegation of departmental authority." 1 Op. Sol. 736 (1937).

Several decisions authored by the ardent supporter of Indian sovereignty, Solicitor Nathan Margold, expressly recognized that Indian tribes possess criminal jurisdiction only over their

⁶ *The Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at pp. 149-51 (1977), concedes that the Department of the Interior "conceived of the power of Indian tribes as being limited to the membership of their own tribes." The Commission referred to the decisions of the Department discussed above, namely 1 Op. Sol. 445 (1934) and 1 Op. Sol. 531 (1935). The Respondent's assertion to the contrary is simply erroneous.

own members.⁷ For instance, Solicitor Margold stated that the "[i]nherent rights of tribal self government may be invoked to justify punishment of members of the tribe **but not of non members**. Non members may be excluded or deported from the tribal jurisdiction, but they are not otherwise subject to punishment at the hands of tribal authorities." [cites omitted]. 1 Op. Sol. 699 (1936). Also see, 1 Op. Sol. 484 (1934). Subsequently, the same conclusion was reached by Acting Solicitor, Frederick L. Kirgis. He expressly concluded that a Canadian Indian could only be subjected to "the local Indian court and the tribal ordinances as long as he is a member." On the other hand, "Mr. Deegan cannot be removed from the reservation as long as he remains a member of the tribe." 1 Op. Sol. 856 (1938).

It is curious to find that the Salt River Tribe relies upon the decisions of the Department of the Interior relating to criminal jurisdiction over nonmember Indians on the Rocky Boy's Reservation. See Br. of Resp. at p. 22. Unfortunately, the Respondent's brief fails to mention all of the decisions of the Department of the Interior which review the problem of criminal jurisdiction on the Rocky Boy's Reservation.

⁷ Professor Nathan Margold was appointed Solicitor in 1933 by Harold L. Ickes, Secretary of the Interior. In turn, Professor Margold hired Felix Cohen to help draft legislation which would transfer to Indian tribes and individual Indians greater authority over their own economic and political affairs. The Act, originally called the Wheeler-Howard Act, later became known as the Indian Reorganization Act of 1934, Title 25 U.S.C. Sec. 461 *et. seq.* Felix Cohen later became Associate Solicitor and Chairman of the Interior's Board of Appeals. See the bibliography of Felix S. Cohen, which is reprinted in F. Cohen, *Handbook of Federal Indian Law* (1942 ed.).

But, even the Indian Reorganization Act, as originally drafted, provided for tribal or community courts that would exercise criminal jurisdiction only over "members of the chartered community", and only if prosecution had not been instituted "in any other court of competent jurisdiction." A federal Court of Indian Affairs was envisioned to handle all cases involving inter-tribal offenses. Hearing before the Committee on Indian Affairs, United States Senate, 73rd Cong., 2d Sess., on S. 2755 (To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise) at pp. 3 and 12-13 (1934). The proposed legislation was similar to the provisions of the Western Territory Bill (1834). See Br. of Pet. at pp. 28-30, 37. The same understanding of and proposals for criminal jurisdiction by Indian tribes existed for one-hundred years.

Solicitor Margold offered two solutions to the Superintendent of the Rocky Boy's Agency relative to the enforcement of criminal laws over nonmember Indians on the reservation. First, Solicitor Margold suggested that the Secretary of the Department of the Interior could "delegate to the tribal court authority to deal with such Indians."⁸ Second, the Solicitor suggested that the problem "might be alleviated if those nonmember Indians who have apparently lived on the reservation for some time, making their homes on tribal land, and who are related to members of the tribe, were to be adopted into full tribal membership." 1 Op. Sol. 849 (1938). Less than two months later, Solicitor Margold suggested that "a gap of law

⁸ Commissioner Price first originated the Court of Indian Affairs in order to combat "heathenish" customs during 1883. Congress never expressly authorized the origination or operation of the Court of Indian Offenses. However, Congress subsequently appropriated funds to maintain and operate not only the Court of Indian Offenses, but also Indian police employed by the Department of the Interior. The Continued acquiescence by Congress over the exercise of the power to maintain peace and order upon Indian reservations by the Department of the Interior implicitly authorized their existence. 1 Op. Sol. 531, 535 (1935). In *United States v. Clapox*, 35 Fed. 573, 577 (D.C. Ore 1888), the Court of Indian Offenses was described as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." The Secretary of Interior derived its authority to make rules and regulations dealing with Indian affairs from several acts of Congress giving that office general regulatory power over Indian affairs. 1 Op. Sol. 531 (1935).

The Department of Interior specifically recognized that Courts of Indian Offenses do not rely solely upon the authority of the Secretary of Interior to establish legal validity. Indian tribes have the inherent power to govern their own members. 1 Op. Sol. 531, 536 (1935). The Secretary of the Interior authorized the Court of Indian Offenses to exercise jurisdiction over nonmember Indians. Also see, 1 Op. Sol. 985 (1940); 1 Op. Sol. 891 (1939); 2 Op. Sol. 2078 (1938); 1 Op. Sol. 844 (1938).

The Respondents also rely upon an opinion of Solicitor Margold relating to efforts by the Navajo tribe to prohibit the introduction of peyote on its reservation. 1 Op. Sol. 1009 (1940). The Solicitor apparently suggested that the proposed ordinance could apply to nonmembers as well. See Br. of Resp. at p. 22. But, of course, all nonmembers can be excluded from the reservation by the tribe. Moreover, the Navajo tribe was operating under a "CFR Court" or Court of Indian Offenses under the B.I.A. in 1940. It first established a tribal court in 1958. Navajo Tribal Council Resolution CO-69-58. The CFR Court, as an arm of the federal government, could assert jurisdiction over nonmembers in 1940.

enforcement" may exist when an attempt is made to subject a nonmember to criminal jurisdiction under a "tribal" law and order code, rather than the authority and regulations of the Department of the Interior. 1 Op. Sol. 859 (1938).

The same problem was revisited by the Department of the Interior a few months later. Acting Solicitor, Frederick L. Kirgis, again suggested that the Rocky Boy's Tribe could exclude nonmember Indians from the reservation, but could not prosecute them for criminal offenses. Again, he suggested that the Department of the Interior, which "has broad jurisdiction over recognized Indians on Indian reservations", could delegate criminal jurisdiction to the Rocky Boy's Tribe. 1 Op. Sol. 872, 873 (1939).

In an extensive decision examining tripartite jurisdiction over Indian reservations, the Acting Solicitor, Frederick L. Kirgis, unequivocally concluded that "the unextinguished fragments of tribal sovereignty" relating to criminal jurisdiction "is primarily a personal rather than a territorial sovereignty." 1 Op. Sol. 891, 894-96, (1939).⁹ As a result, tribal governments

⁹ The concept of personal, rather than territorial sovereignty was consistent with the power of an Indian tribe to exercise jurisdiction over members off of the reservation. 1 Op. Sol. 891, 894-96 (1939). On the other hand, it has also been recognized that a "citizen" of the United States could not historically be subjected to the jurisdiction of tribal courts regardless of his or her actions on or "contacts" with the reservation. See, e.g., 1 Op. Atty. Gen. 939 (1834); 2 Op. Atty. Gen. 1640 (1843); 7 Op. Atty. Gen. 174, 184 (1855).

The Respondent's and the government's reliance upon the opinion of the Attorney General relating to the offense of murder "of one tribal Indian by another, their tribes being different, and the murder having been committed within the reservation of a third tribe . . ." is misplaced. The Br. of Resp., at page 21, and the Brief for the United States, at page 13, fail to mention that the murder occurred on the land of a tribal government without any law to cover the case. 17 Op. Atty. Gen. 566, 567 (1882). As a result, the Attorney General concluded that the tribe of the offender may assert criminal jurisdiction. Again, the concept of "personal", rather than territorial, jurisdiction was reinforced.

This Court has consistently recognized that Indian tribes maintain the right of occupancy over reservations without title to the land they possessed. *Winton v. Amos*, 255 U.S. 373, 391-92 (1921); *United States v. Kagama*, 118 U.S. 375, 380-82 (1886); *United States v. Rogers*, 45 U.S. (How.) 567, 572 (1846); and *Johnson v. McIntosh*, 21 U.S. 542, 573-74 (1823). Also see, 3 Kent's Commentaries (14th Ed.), at pp. 379-87, 399-400.

exercise jurisdiction over their own "members except as may be limited by Federal statutes." 1 Op. Sol. 891, 897 (1939). In turn, federal courts, established under Article III of the United States Constitution, exercise "an absolute and exclusive jurisdiction over any recognized Indian anywhere within Indian country." *Ibid.* Finally, the Department of the Interior exercises administrative guardianship powers over "all the Indians within the reservation, regardless of their residence or temporary location . . .". 1 Op. Sol. 891, 893 (1939). See *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1883).

In a later decision analyzing and entitled the "Relation of Pueblos to their Members, the Federal Government, the State, and Others", Solicitor Margold reaffirmed the conclusion that Indian Tribes are allowed to administer justice only with respect to their own members. At the same time, Indian tribes are allowed to remove or exclude nonmembers of the tribe from the limits of the reservation. 1 Op. Sol. 913, 916, and 928 (1930). Also see, 1 Op. Sol. 985 (1940).

The Respondent relies upon Felix Cohen's *Handbook of Federal Indian Law* to support its assertion of criminal jurisdiction over nonmember Indians. However, Cohen recognized that Indian tribes generally have criminal jurisdiction over their own members and civil jurisdiction over their own territory. "An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation . . .". F. Cohen, *Handbook of Federal Indian Law*, at p. 148 (1942 ed.). The respondent has misconstrued a fundamental concept clearly annunciated by Felix Cohen. Indian tribes could only exercise criminal jurisdiction over their own members. Tribal courts exercised criminal jurisdiction over nonmember Indians only under express delegation by the Department of the Interior.

Some tribes have exercised a similar jurisdiction, under express departmental authorization, over Indians of other tribes found on the reservation.

Ibid. Felix Cohen generally recognized that the laws of Indian tribes "owe their force to the will of members of the tribe." *Ibid.* at p. 122. In his chapter entitled "Criminal Jurisdiction",

Mr. Cohen quotes extensively and approvingly from the decision of Frederick L. Kirgis, Acting Solicitor, dated April 27, 1939. 1 Op. Sol. 891 (1939). See F. Cohen, at pp. 359-362 (1942 ed.). Mr. Cohen reiterates the position of the Department of the Interior that Indian tribes do not possess "a strictly territorial sovereignty, but primarily a personal sovereignty." *Ibid.* at p. 361.¹⁰

¹⁰ The "Indian on Indian" exception to federal jurisdiction found in Title 18 U.S.C. Section 1152 can be understood by the historical landmarks discussed above. The Court of Indian Offenses operated by the Department of Interior exercised broad criminal jurisdiction over all Indians wherever they might be found. In turn, the Department delegated, at times, jurisdiction to Indian tribes. As a result, it was unnecessary for federal courts to exercise further jurisdiction over Indian crimes. In addition, the federal government contemplated and ratified treaties providing for the establishment of Indian Country west of the Mississippi, where Indian tribes would collectively exercise jurisdiction over individual Indians.

In accordance with this state of things, the 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

1 Op. Atty. Gen. 693, 695 (1834). The Respondent has failed to provide any evidence that Congress intended to delegate criminal jurisdiction over intertribal offenses to individual Indian tribes.

Of course, the federal government exercised criminal jurisdiction over intertribal disputes ever since the treaty period. See the Br. of Pet. at pp. 21-26. Also see, the proposed Act of 1830 authorizing the President to exchange land with Indians and provide for their removal west of the Mississippi River. (May 28, 1830); Letter from William Clark, Superintendent Indian Affairs, to Secretary of War dated March 1, 1826, Doc. No. 231, at p. 654 (American State Papers).

Strong historical precedent also exists for the exercise of state jurisdiction over Indians not subject to the jurisdiction of tribal courts. Specifically, Solicitor Margold found "no objection" to the continued exercise of state jurisdiction "in accordance with the practice of some years' standing" to punish Indians not subject to the jurisdiction of a Court of Indian Offenses. 1 Op. Sol. 591 (1935). Also see, 17 Op. Atty. Gen. 460 (1882). State and territorial courts were given jurisdiction over Indians that had received allotment of land under the General Allotment Act of 1887. 2 Op. Sol. 1457 (1947); 1 Op. Sol. 1974 (1941); F. Cohen, *Handbook of Federal Indian Law*, at pp. 359-61 (1942 ed.). Since over eighty percent of Indian land was lost through allotment, state courts exercised significant jurisdiction over Indian allotment lands from 1887 to 1948, when "Indian Country" was redefined to include Indian allotments. See the Br. for the U.S. at n.14.

The personal, retained sovereignty of the Salt River Tribe does not authorize criminal jurisdiction over Albert Duro, a nonmember Indian.¹¹

Respectfully submitted,

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¹¹ Mr. Duro maintains that tribal prosecution of nonmember Indians, in light of *Oliphant*, violates the equal protection provisions of both the Indian Civil Rights Act of 1968 and the United State Constitution. (Joint App. at p. 10).

APPENDIX

APPENDIX
101st Congress
1st Session
S.517

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

IN THE SENATE OF THE UNITED STATES

March 6 (legislative day, January 3), 1989

Mr. Hatch introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.
That this Act may be cited as the "Indian Civil Rights Act Amendments of 1989".

Sec. 2. Title II of the Civil Rights Act of 1968 (Public Law 90-284, 25 U.S.C. 1301 et. seq.), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding to the end thereof the following new section:

"CIVIL ACTIONS"

Sec. 204. (a) Compliance With Section 202.— Federal district courts shall have jurisdiction of civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

"(b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reason-

able under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive, or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

"(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that—

"(1) the tribal court was not fully independent from the tribal legislative or executive authority;

"(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

"(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive, or other equitable relief, to interpose a defense of immunity;

"(4) the tribal court failed to resolve the merits of the factual dispute;

"(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

"(6) the tribal court did not adequately develop material facts;

"(7) the tribal court failed to provide a full, fair and adequate hearing; or

"(8) the factual determinations of the tribal court are not fairly supported by the record,

in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

"(d) In any civil action brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs."

22 Aug 1988

Honorable Orrin Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Subject: S. 2747; "Indian Civil Rights Act Amendments of 1988"

Dear Senator Hatch:

I am writing in support of S. 2747, a bill to amend the Indian Civil Rights Act of 1968, 82 Stat. 77-78 (Public Law 90-284) (Title-II of the Civil Rights Act of 1968). The amendment strengthens enforcement of the ICRA by providing federal courts with carefully structured jurisdiction to enforce individual rights under the Act.

The amendment is necessary, in our view, because existing ICRA compliance procedures fail to fully protect rights secured by the ICRA. In some cases, for example, tribal courts do not exist. In other circumstances, tribal courts may lack authority to review actions of tribal governments. In addition, sovereign immunity and other jurisdictional barriers may limit the ability of tribal courts to effectively enforce the ICRA. Finally, because many tribal courts are subordinate to other branches of tribal government, judicial independence suffers; the lack of a meaningful separation of tribal powers may result in an impermissible interference with the work of tribal courts.

1. Introduction

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-3, fills the void left by the Constitution's failure to limit or restrict tribal authority. *See, Talton v. Mayes*, 163 U.S. 376 (1896). The Act provides "for the American Indian the broad constitutional rights afforded to other Americans," and thereby "protect individual Indians from [unwarranted] actions of tribal governments". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th

Cong., 1st Sess., 5-6 (1967)). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus, it is unenforceable in federal courts. Instead, tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. *Santa Clara Pueblo, supra*. The enforcement of such basic guarantees as free speech, due process and equal protection are wholly dependent on the effectiveness of tribal institutions and procedures—often the same tribal institutions and procedures alleged to have violated the act. We understand that the purpose of the proposed amendment is to remedy tribal non-compliance with the ICRA by providing access to federal district courts. Federal district court jurisdiction, together with a right of action by aggrieved individuals or the Attorney General, will check current compliance problems and assure a meaningful ICRA enforcement program.

Although tribal measures to enforce the ICRA are available in theory, such remedies may be unavailable in practice. Nearly one-half of all tribal governments, for example, have no tribal court. Where tribal courts exist, they may lack the power to review legislative or executive action, suffer jurisdictional impediments or be subordinate to the tribal council. Since the Supreme Court's decision in *Santa Clara Pueblo, supra*, the available literature, including the Report of the Presidential Commission on Indian Reservation Economies, and a number of federal court decisions, question the effectiveness of ICRA enforcement in tribal court. Allegations of ICRA violations also surfaced recently in hearings held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, Flagstaff, Arizona, and Portland, Oregon, a number of Indians and non-Indians shared evidence of non-compliance with the ICRA.

In order to assure that rights secured by the ICRA are enforced fully, change in the existing compliance procedure—including expanded access to federal district courts—is critical. Federal district court ICRA enforcement jurisdiction, coupled with the requirement of exhausting available tribal remedies and the other limitations built into the amendment,

balance legitimate tribal interests with a meaningful and effective ICRA compliance program. Without the amendment proposed here, or one very similar, individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in theory but not in practice.

2. Failure To Enforce The ICRA Fully Post Santa Clara Pueblo

For 10 years prior to *Santa Clara Pueblo*, *supra*, the ICRA was routinely enforced in both tribal and federal courts. In fact, there is a strong presumption that an effective ICRA enforcement program encourages capital investment, jobs and tribal economic development generally. See, e.g., *Report And Recommendations To The President Of The United States*, Presidential Commission On Indian Reservation Economies, November, 1984. At least three factors, however, contribute to current ICRA noncompliance at the tribal level: first, judicial review may be unavailable or limited; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies may interfere with tribal courts.

a. The Lack Of Meaningful Judicial Review

The tribal courts lack clear authority to review tribal government action. See, Ziontz, *After Martinez: Civil Rights Under Tribal Governments*, 12 U.C. Davis L. Rev. 1, at 10-12 (1980). In some tribes, judicial review may be limited or not exist at all. Tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes. See, e.g., *Santa Clara Pueblo*, *supra*. In other tribes, judicial review may be limited. The Cheyenne River Sioux Tribe, for example, explicitly reserves final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CF. Still other tribal councils address judicial review on a case-by-case basis. See, for example, Oglala Sioux Tribal Resolution No. 87-76 which provides in part:

WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the *Moore* case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of *Margaret Moore v. Oglala Sioux Tribal Personnel Board*, *et al.* are hereby declared null and void.

Elsewhere the rule may not be as clear, but the same tribal body against which suit has been filed may be also called upon to determine its propriety. See, *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985), citing Justice White's dissent in *Santa Clara Pueblo*.

b. Sovereign Immunity And Other Jurisdictional Barriers To ICRA Enforcement In Tribal Court

MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?

MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present [1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?

MR. GARREAU: Unless the council waives sovereign immunity.

MS. MILLER: Which it hasn't done.

MR. GARREAU: No, they have not, for anyone.

Hearings, *supra*, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss or limit ICRA actions by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in *Satiacum v. Sterud*, No. 82-1157 (Puy. Tr. Ct., April 23, 1982), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejected the argument that *Santa Clara Pueblo* "represents an explicit waiver of the tribe's immunity" in an ICRA action in tribal court. *Id.* at 6015. See, also, *Whatoname v. Hualapai Tribe et al.*, Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts". Unreported slip op. at 8). In *DuBray v. Rosebud Housing Authority*, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb 1, 1985), 12 Indian L. Rep. 6015 (*app. pndg.*, South Dakota Intertribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity suits based on claim under [the ICRA]". *Ibid.* Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiffs' [ICRA] complaint must be dismissed." *Ibid.*

The Colville Tribal Court, relying in part on a tribal ordinance which held that "the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties," dismissed a reapportion-

ment suit against the tribal Business Council brought pursuant to the ICRA. *Colville Confederated Tribes Business Council v. George*, No. CV84-402, (Colv. Tr. Ct., Nov. 8, 1984), 11 Indian L. Rep. 6049, 6050. See, also, *Garman v. Fort Belknap Community Council*, No. CV83-238, (Ft. Blkp Tr. Ct., Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts") and the cases cited by Johnson and Madden, *Sovereign Immunity In Indian Tribal Law*, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

In cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parties are members of the tribe or each consent to tribal court jurisdiction. See, *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981) ("[A]ccess was denied to tribal court". *Id.* at 685. (Holloway, J., dissenting)).

c. The Lack Of Judicial Independence Contributes To ICRA Non-Compliance

Although some tribal courts may be successful in establishing the principle of judicial review and, further, may even overcome serious jurisdictional barriers such as the doctrine of sovereign immunity, other obstacles may still impede the full enjoyment of rights secured by the ICRA. Tribal governing bodies, for example, may interfere with the process of tribal courts. While there may be the appearance of ICRA enforcement of the tribal level, the reality is often impaired by a lack of tribal separation of powers or judicial independence. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that the

failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judi-

cial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, supra, Part One, 29.

Recent hearings before the United States Commission on Civil Rights provides further evidence that tribal courts may be preempted in their effort to enforce rights secured by the ICRA. Former Chief Judge Trudell Guerue of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerue, *The Indian Civil Rights Act—How It Is Used As License And Not As Protection*, 1986, 3 (unpublished paper in the files of the United States Commission on Civil Rights). This is true, according to Guerue, because tribal councils control tribal courts; "removal from office or the bench is not an uncommon tribal council tool." *Id.* at 4. This lack of judicial independence or separation of tribal powers was echoed by a number of other Indian judges. For example, former tribal judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing—because I know; I was one of the individuals that was removed.

Hearings before the United States Commission on Civil Rights, Rapid City, S.D., 1986, 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." *Id.* at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In *Shortbull v. Looking Elk*, 677 F. 2d 645 (8th Cir.), cert. denied, 459 U.S. 907 (1982),

the Eighth Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." *Id.* at 650. Similarly, in *Runs After v. United States, supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistributing plan "the Tribal Council terminated the tribal court judge * * * and appointed a new tribal court judge." *Id.* at 348. In addition, the tribe "forever barred" the original *Runs After* judge from tribal political or elective office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. *Id.* at 349.

3. The Need To Expand Federal District Court ICRA Jurisdiction

With the exception of habeas corpus authority, ICRA enforcement is now left exclusively to tribal forums. The Supreme Court's dicta that tribal forums are "available to vindicate rights created by the ICRA", *Santa Clara Pueblo, supra*, at 65, has, in some cases, not proved accurate. The failure to establish tribal courts, the lack of judicial review, the doctrine of sovereign immunity, jurisdictional barriers, and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA. Administrative solutions, including budget priority and more training for tribal judges, while important, solve only part of the problem; standing alone such remedies fail to address the systemic or institutional factors discussed above.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In *Garreaux v. Andrus*, 676 F. 2d 1206 (8th Cir. 1982), for example, the Eighth Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing *Santa Clara Pueblo*, went on to hold that federal courts lack statutory authority to consider ICRA

claims. *Id.* at 1210, n. 2. See also, *Shortbull v. Looking Elk*, *supra*; and *R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933, 939 (D.C. Mont. 1981), rev'd and remanded on other grounds, 719 F. 2d 979 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985) ("This case illustrates the absurd results that the broad rule of [*Santa Clara Pueblo*] can cause.").

Courts, however, properly defer to congressional action. In *Wells v. Philbrick*, 486 F. Supp. 807 (D.S.D 1980), for example, the court said

[i]t certainly may be argued that the effect, after *Santa Clara Pueblo*, of the ICRA is to create rights while withholding any meaningful remedies to enforce them, but it is for Congress, not the Courts, to resolve this state of affairs [citing *Santa Clara Pueblo*, 436 U.S. at 72].

Id. at 809 [citation omitted].

Evidence of non-compliance with rights secured by the ICRA is important because, as the Court noted in *Santa Clara Pueblo*,

Congress' authority over Indian matters is extraordinarily broad *** Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Id. at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, *supra*, Part One at 30.

Support for federal court ICRA enforcement authority can be found in the literature as well. Professor Wilkinson, for

example, argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, *American Indians, Time, and the Law*, Yale Univ. Press, 1987, 113. A similar view was voiced by Gover and Laurence. In discussing the need to modify both *Santa Clara Pueblo*, *supra*, and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), they suggest that:

[t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems *** . [A legislative] modification of *Santa Clara* to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress *** . It would place a scalpel back in the federal judge's hand ***

Gover and Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation In Federal Court of Civil Actions Under the Indian Civil Rights Act*, (Symposium on Indian Law), 8 Hamline L. Rev. 497, 523 (1985).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the United States Commission on Civil Rights:

MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?

JUDGE SAMBROAK: Yes.

Hearings, before the United States Commission on Civil Rights *supra*, at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Briefing Before the United States Commission on Civil Rights, Washington, D.C., February, 1986, at 196.

4. Conclusion

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of ICRA enforcement, was premised on the assumption that "[t]ribal forums are available to vindicate rights created by the ICRA." *Id.* at 65. The record now shows serious tribal "deficien[cies] in applying and enforcing" the ICRA. Accordingly, we look to Congress, as did the Court in *Santa Clara Pueblo*, to permit "civil actions for injunctive or other relief to redress violations of [the ICRA]." *Id.* at 72. Systemic, institutional factors, including the lack of judicial review, jurisdictional impediments, sovereign immunity and the failure to provide for effective judicial independence, often contribute, as a practical matter, to the failure to enforce fully rights secured by the ICRA post *Santa Clara Pueblo*.

As tribal governments flourished under the policy of self-determination, the number of tribal courts autonomous from the federal government has also grown. In addition to providing for federal court ICRA enforcement authority, the legislation contains a number of incentives to strengthen and further develop tribal courts. Specifically, the amendment encourages tribal courts to resolve ICRA complaints by requiring individuals to exhaust tribal remedies before seeking a federal court solution, by limiting federal relief to equitable remedies, by requiring federal courts to adopt tribal findings of fact if certain circumstances are met, and by providing for deference to tribal court interpretation of tribal laws and customs.

We believe that the carefully construed approach to federal jurisdiction contained in this bill is consistent both with our goal to provide an effective and meaningful ICRA compliance process and with the principle that "federal courts must avoid undue or intrusive interference in reviewing tribal court procedures." *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409, 1412, (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 465, 93 L.Ed. 2d 410. As in federal habeas corpus cases under section 203 of the Act, it is anticipated that "where the tribal court procedures under scrutiny differ significantly

'from those commonly employed in Anglo-Saxon society,' *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976), courts [will] weigh 'the individual right to fair treatment' against 'the magnitude of the tribal interest (in employing those procedures)' to determine whether the procedures pass muster under the act." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), *quoting Stands Over Bull v. Bureau of Indian Affairs*, 442 F.Supp. 360, 375 (D.Mont. 1977), *appeal dismissed*, 578 F.2d 799 (9th Cir. 1978).

Federal district court ICRA jurisdiction, coupled with the limitations built into the amendment, *e.g.*, exhaustion of tribal remedies, relief limited to equitable remedies and tribal incentives to resolve ICRA complaints locally, balances legitimate tribal interests with a meaningful program to protect individual statutory rights. Access to federal courts reverts to the pre-*Santa Clara Pueblo* status quo and guarantees those the ICRA was enacted to protect an effective statutory enforcement forum.

We are informed by the Office of Management and Budget that the view expressed in this letter are in accord with the program of the President.

Sincerely,

/s/ Thomas M. Boyd

THOMAS M. BOYD

Acting Assistant Attorney General
Office of Legislative Affairs

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO, PETITIONER

v.

EDWARD REINA, CHIEF OF POLICE, SALT RIVER
DEPARTMENT OF PUBLIC SAFETY, SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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371/12

QUESTION PRESENTED

Whether an Indian tribe has jurisdiction to prosecute Indians who are members of another tribe for offenses committed on the tribal reservation.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-6546

ALBERT DURO, PETITIONER

v.

EDWARD REINA, CHIEF OF POLICE, SALT RIVER
DEPARTMENT OF PUBLIC SAFETY, SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

INTEREST OF THE UNITED STATES

The United States has a statutory responsibility for law enforcement on Indian reservations under 18 U.S.C. 1151-1153. That statutory responsibility is complementary to the tribal law enforcement authority, the scope of which is at issue in this case. In addition, by virtue of its trust responsibility to the Indians as well as its responsibility to protect the civil rights of all its citizens, the United States has an interest in assuring that law enforcement by the tribes themselves is both fair to all defendants and effective in assuring an orderly and peaceful reservation.

STATEMENT

1. Petitioner is an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians, and has lived a large portion of his life off-reservation, apparently in California (Pet. App. B 1138). Between March and

June, 1984, he lived with a woman friend, a member of the Salt River Pima-Maricopa Indian Community (the Community), on that Tribe's reservation in Arizona.¹ During this time, he also worked for the PiCopa Construction Company, which is owned by the Community (*ibid.*).

On June 18, 1984, a complaint was filed in federal court charging petitioner with murder and aiding and abetting murder, in violation of 18 U.S.C. 2, 1111 and 1153. On that same date, he was charged in the tribal court of the Salt River Reservation with discharging a firearm on the reservation, in violation of the Salt River Community's Code of Misdemeanors. In both cases, it was alleged that petitioner shot and killed a fourteen-year-old boy within the boundaries of the reservation. The victim was an enrolled member of the Gila River Indian Tribe of Arizona, which resides on a separate reservation. Pet. App. B 1138.

Federal agents arrested petitioner. Although he was indicted in federal court for first degree murder, that indictment was later dismissed without prejudice on the motion of the government. Petitioner was then placed in the custody of the tribal Community Department of Public Safety. Pet. App. B 1138-1139.

He petitioned the United States District Court for the District of Arizona for a writ of habeas corpus, which that court granted. Pet. App. D 1-6. The district court relied on the Indian Civil Rights Act of 1968, specifically 25 U.S.C. 1302(8), which states that an Indian tribe exercising powers of self-government may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The court found that the Community's code of ordinances provides for criminal jurisdiction over any nonmember, but that such jurisdic-

¹ Both the Torres-Martinez Band and the Salt River Pima-Maricopa Indian Community are federally recognized Indian tribes. See 53 Fed. Reg. 52,829, 52,831, 52,832 (1988).

tion is asserted only over nonmember Indians.² The court ruled that the Community's enforcement policy was not justified "under either the rational basis or strict scrutiny standards," and that the assertion of criminal jurisdiction over petitioner therefore violated 25 U.S.C. 1302 (8). Pet. App. D 5.

The court of appeals reversed, with Judge Sneed dissenting (Pet. App. B).³ The court first noted that in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court held that tribes lack criminal jurisdiction over non-Indians. The Ninth Circuit observed that that opinion referred only to non-Indians, as some subsequent opinions of this Court have recognized (*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845-853 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153 (1980)), although others have more generally characterized *Oliphant* as applying to nonmembers of the tribe (*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-173 (1982) (Stevens, J., dissenting); *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). The court concluded, Pet. App. B 1140-1141, that this Court "has not used the terms non-Indian and nonmember Indian precisely," and that the holdings in the opinions cited above do not depend on making that distinction with regard to *Oliphant*. *Id.* at 1139-1141.

The court then analyzed *Oliphant* itself, explaining that it was based on an historical shared presumption that Indian tribes lack jurisdiction over non-Indians. The court found that no such presumption exists regarding nonmember Indians, and that there is some indication of the opposite understanding—that tribes have jurisdiction over nonmember Indians. Pet. App. B 1141.

² Under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), Indian tribes lack criminal jurisdiction over non-Indians in the absence of an express delegation by Congress.

³ The court's opinion was a substantial revision of a July 9, 1987, opinion by the panel, to which Judge Sneed had also filed a dissent (Pet. App. C).

The court also found in the pattern of federal criminal law set out in 18 U.S.C. 1151-1153 an indication that tribes have criminal jurisdiction over nonmember Indians. Under those statutes, the federal courts have criminal jurisdiction over crimes by or against "Indians" in Indian country, except for "offenses committed by one Indian against the person or property of another Indian," crimes already punished by the local law of the tribe, or where treaties place jurisdiction exclusively in a tribe (18 U.S.C. 1152); federal courts also have jurisdiction over certain specified major offenses committed by one Indian against the person or property of another Indian (18 U.S.C. 1153). The court found in these statutes an understanding that, regardless of the defendant's or victim's particular tribal membership, most crimes by one Indian against another were to be prosecuted in tribal court, while the identified major crimes would go to federal court. It concluded that "if Congress had intended to divest tribal courts of [general] criminal jurisdiction over nonmember Indians they would have done so," and that, in the absence of congressional action, tribes retain that jurisdiction. Pet. App. B 1141-1143.

Finally, the court rejected the argument that the Tribe's assertion of jurisdiction over petitioner violated equal protection principles as reflected in the Indian Civil Rights Act of 1968, 25 U.S.C. 1302. Citing *United States v. Antelope*, 430 U.S. 641, 645 (1977), the court concluded that Indian status is a political rather than racial classification. The court also noted that petitioner was closely associated with the Community because of his relationship with his girlfriend, his residence with her family on the reservation, and his employment with the Community's PiCopa Construction Company. It concluded that these contacts justify the tribal court's jurisdiction over him, and emphasized that this was not "purely a racial determination." Pet. App. B 1144.

The court also ruled that allowing tribal court jurisdiction over member and nonmember Indians has a rational basis because of the inadequacy of federal and

state law enforcement resources for Indians on reservations, and because the existence of such jurisdiction could reasonably be thought to strengthen the tribal courts. The court therefore found no violation of equal protection principles. Pet. App. B 1145.

Finally, the court observed that if tribal courts lacked jurisdiction over most offenses committed by nonmember Indians on the reservation, there would be a jurisdictional void: under 18 U.S.C. 1152, the federal government lacks general criminal jurisdiction over crimes committed by one Indian against another Indian, and since state courts do not (and generally cannot) assert criminal jurisdiction over crimes by Indians on Indian reservations, a lack of tribal court jurisdiction would lead to *no* capacity to prosecute nonmember Indians for committing crimes not specifically identified in 18 U.S.C. 1153 against Indians on the reservation. Pet. App. B 1145-1146.

In his dissenting opinion (Pet. App. B 1146-1152), Judge Sneed concluded that retained tribal sovereignty exists only to govern the behavior of tribal members. While he found 18 U.S.C. 1152 to be consistent with tribal criminal jurisdiction over nonmember Indians, he reasoned that the federal statute does not require or grant that jurisdiction and therefore does not give a tribe powers greater than its retained sovereignty. Finally, Judge Sneed concluded that upholding tribal jurisdiction over nonmember Indians unjustifiably discriminates against those persons.⁴

The court of appeals denied rehearing en banc, with a dissent by Judge Kozinski, joined by two other judges. Pet. App. A. Judge Kozinski argued (as had Judge Sneed) that the court's holding was contrary to *Oliphant* and *Wheeler*; he also found it contrary to *Washington v.*

⁴ Judge Sneed would avoid the jurisdictional gap posited by the panel majority by treating the nonmember Indian as a non-Indian for the purposes of the Section 1152 exception from federal jurisdiction of offenses committed by one Indian against another, but as an Indian subject to federal jurisdiction under that Section. Pet. App. B 1151.

Confederated Tribes, 447 U.S. 134 (1980) and *Montana v. United States*, 450 U.S. 544 (1981).⁵ Judge Kozinski asserted that allowing tribal courts criminal jurisdiction over nonmember Indians would be unjustifiable racial discrimination and therefore a violation of equal protection of the laws. He also took the view that such jurisdiction might unfairly subject individuals to biased tribal courts because of hostility between tribes. Pet. App. A 1468-1470.

SUMMARY OF ARGUMENT

This Court has repeatedly held that federal statutes dealing separately with Indians do not violate the Equal Protection or Due Process Clauses of the Constitution, but instead are based on the historical relationship between the Indian tribes and the federal government. See e.g., *United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974). This Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes lack criminal jurisdiction over non-Indians because of the long historical understanding that such jurisdiction did not exist, and because the federal government by statute had assumed jurisdiction over crimes by non-Indians against Indians in Indian country. The same analysis leads to the opposite conclusion regarding tribal jurisdiction over offenses not covered by the Major Crimes Act committed by nonmember Indians against Indians in Indian coun-

⁵ The *Confederated Tribes* case had allowed an exemption from state tax on the sales of cigarettes between tribal members on a reservation, but expressly did not allow that exemption when the purchaser was a nonmember Indian, because such a tax on nonmember Indians would not impinge on tribal sovereignty (447 U.S. at 160-161). The *Montana* case concerned a tribe's rights to regulate hunting and fishing by non-Indians on non-Indian land within the boundaries of a reservation. This Court's opinion states that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. See Judge Kozinski's opinion, Pet. App. A 1466.

try. That jurisdiction has always been retained by the tribes.

Under the earliest treaties with the Indians and the concurrent federal laws, the federal government asserted jurisdiction to punish citizens for certain specified offenses, and to protect citizens against certain offenses by Indians in Indian territory, but left all other offenses, whether committed by or against Indians, to be dealt with by the Indians in accordance with their traditional systems. Gradually, federal jurisdiction was extended, first to all offenses involving non-Indians, then, under the Major Crimes Act, to certain specified serious offenses even when committed by an Indian against the person or property of an Indian. Nevertheless, the original understanding that nonspecified offenses committed by Indians against Indians remain subject only to Indian tribal customs continues to be part of the current criminal justice system.

The evolution of the relationship between state and Indian criminal jurisdiction has followed a somewhat similar path. Originally, the State had absolutely no jurisdiction over offenses committed on a reservation within its boundaries. Although eventually state jurisdiction was recognized over offenses committed on the reservation that did not involve Indians either as perpetrators or victims, it remains true today that the State has no jurisdiction over on-reservation offenses involving Indians except pursuant to procedures established under Public Law 280 or similar statutes. In Public Law 280, Congress authorized any State that is ready to commit the resources necessary to maintain law and order in Indian country within its boundaries to assume criminal jurisdiction over such areas following completion of required statutory procedures, including (since 1968) Indian acceptance of state jurisdiction. Absent such express assumption of state jurisdiction,⁶ the criminal jurisdiction that has not been assumed by the federal government remains with the tribe.

⁶ Arizona has never assumed such jurisdiction.

Consideration of the relative interests involved confirms this conclusion. Reservations, which are often located in remote, sparsely settled areas; typically contain substantial populations of Indians who are not members of the "home tribe."⁷ It is not realistic in such circumstances for the residents to rely on the limited availability of state and federal law enforcement resources for the maintenance of law and order on the reservation. This is particularly true since, unlike the situation in *Oliphant*, the absence of tribal jurisdiction would create the likelihood of a gap in criminal jurisdiction, placing certain offenses beyond any legal system. Unless the tribe has jurisdiction over offenses not within the Major Crimes Act committed on the reservation by a non-member Indian against the person or property of an Indian, such offenses may not be punishable at all. That jurisdictional gap would seriously threaten the maintenance of law and order on the reservation; accordingly, the preservation of tribal jurisdiction here is important in order to maintain the tribe's right to the peaceful enjoyment of its territory, one of the rights inherent in its limited sovereignty.

The existence of tribal jurisdiction over nonmember Indians does not violate their rights. Although tribes are not subject to the limits imposed by the Constitution on the state and federal governments, they are subject to the Indian Civil Rights Act, which contains comparable equal protection and due process guarantees. The tribe does not violate those guarantees so long as it treats everyone subject to its jurisdiction alike, whether a tribal member or a non-member Indian, and provides for fair treatment. There is no claim here that petitioner, who has not yet been tried by the tribal court, has been treated unfairly by the tribal judicial system itself. Such claims can, in any event, be presented to a federal court through a writ of habeas corpus under the Indian Civil

⁷ Indeed, in some parts of Indian country, there may not even be a "home tribe." See note 28, *infra*.

Rights Act. Nor does the fact that petitioner is subject to tribal jurisdiction because he is an enrolled member of an Indian tribe offend the federal Constitution, even though a non-Indian citizen would not be so subject. Distinctions based on such enrollment are not immutable racial classifications—tribal membership is voluntary, and if it is formally renounced, the individual is thereafter treated like any other non-Indian citizen for purposes of criminal jurisdiction. This Court has consistently recognized that distinctions based on tribal membership, like those reflected in the federal statutory plan, are appropriate in light of the unique relationship between the tribes and the federal government.

ARGUMENT

Article I, § 8, Cl. 3 of the Constitution empowers Congress to "regulate Commerce * * * with the Indian Tribes." The Court has long recognized that this clause, together with the unique historical relationship between the United States and the Indian tribes, authorizes Congress to enact laws specifically applicable to Indians. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959); *United States v. Antelope*, 430 U.S. 641, 645 (1977). In particular, legislation providing that enrolled members of Indian tribes shall be treated differently from citizens who are not tribal members does not reflect an impermissible racial classification. *Antelope*, 430 U.S. at 645-646; *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974). Moreover, in the area of criminal law enforcement, the Court has specifically held that constitutional equal protection guarantees do not prohibit the treatment of Indian tribal members differently from non-Indians (*Antelope*, 430 U.S. at 647-650).

Of course, the fact that such a rule may be constitutionally permissible does not of itself indicate that a special rule or practice applies in the Indian context. For example, this Court concluded in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that jurisdiction to

try non-Indians for offenses committed in Indian country is not part of the retained tribal sovereignty. It reached that conclusion on the basis of an analysis of the "treaties drawn and executed by the Executive Branch and legislation passed by Congress[,] * * * read in light of the common notions of the day and the assumptions of those who drafted them" (*Oliphant*, 435 U.S. at 206). A similar analysis leads to the conclusion that retained tribal sovereignty *does* include jurisdiction to try enrolled members of any Indian tribe who reside within the tribal court's jurisdiction.⁸

**I. TRIBAL GOVERNMENTAL INSTRUMENTALITIES
HAVE LONG BEEN RECOGNIZED AS RETAINING
CRIMINAL JURISDICTION OVER OFFENSES
COMMITTED BY ALL INDIANS AGAINST INDI-
ANS IN INDIAN COUNTRY**

Federal legislation has from the earliest enactments occupied the field of criminal jurisdiction involving Indians in Indian country, to the exclusion of state jurisdiction. Originally, Congress dealt only with specific crimes involving non-Indians as perpetrators or victims, and left crimes by Indians against Indians to be dealt with by the tribes. See *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). In the Act of Mar. 3, 1817, ch. 92, 23

⁸ We submit that an appropriate test for determining whether a resident is an Indian for purposes of tribal court jurisdiction is whether the individual is an enrolled member of an Indian tribe. See *Antelope*, 430 U.S. at 646-647 n.7 (stating that enrolled tribal members are, by reason of enrollment, "not emancipated from tribal relations", and suggesting that enrollment is by itself enough to justify treating an individual as an Indian so that federal criminal jurisdiction attaches; leaving open question whether it is an absolute requirement). It is unnecessary in this case to determine whether other factors, either singly or in combination, would also serve to identify a resident as an Indian subject to tribal court jurisdiction, or whether tribal court jurisdiction would extend to non-resident Indians. Specifically, the Court need not consider whether the court below appropriately suggested a "totality of circumstances" test for determining Indian status for purposes of tribal court criminal jurisdiction. See Pet. App. B 1144.

Stat. 383, Congress adopted the criminal laws of the United States applicable in federal enclaves to the territory belonging to any Indian tribe, and expressly disclaimed jurisdiction over crimes committed in that territory by Indians against Indians. The statute specifically stated:

That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary.

Section 25 of the Act of June 30, 1834, ch. 161, 4 Stat. 733, continued the exception for "crimes committed by one Indian against the person or property of another Indian." See *United States v. Wheeler*, 435 U.S. 313 (1978). Cf. Sections 3-5 of the Act of Mar. 27, 1854, ch. 26, 10 Stat. 270.⁹

When these statutes were passed, Congress made no distinctions based on tribal membership: the distinction was simply between Indians and non-Indians. Federal criminal jurisdiction extended to Indians whenever the crime involved a non-Indian, either as perpetrator or victim. Absent such involvement, Indian tribes retained criminal jurisdiction, within their boundaries, over Indians generally.¹⁰ See H.R. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis in original):

⁹ Section 3 of the 1854 Act further manifested the intention to leave crimes by Indians against Indians to tribal punishment. It added an exception from federal jurisdiction for crimes punished "by the local law of the tribe" and also restored the exception where exclusive jurisdiction was given to a tribe by treaty.

Sections 4 and 5 spelled out specific crimes: arson and assault with a deadly weapon. The crime of arson applied to a non-Indian no matter whose building was burned, but to Indians only if they set fire to property at least partially owned by a non-Indian. Likewise, the crime of assault applied to a non-Indian assaulting anyone, but to Indians only when they assaulted non-Indians.

¹⁰ On pages 29-37 of his brief, petitioner cites a number of early Indian treaties which assert federal jurisdiction over crimes by

It will be seen that we cannot, consistently with the provisions of some [of] our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, at any place within their own limits.

This Court early recognized that this reservation of tribal jurisdiction was not limited to members of the tribe possessing a particular piece of Indian country. It interpreted the Indian-against-Indian exception of Section 25 of the 1834 Act in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), ruling that it applied to Indians as a class—without regard to tribe. “[The exception] does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs” (45 U.S. at 573).

Indians against “citizens of the United States” or by “citizens” against Indians. These treaties are simply further examples of the general assertion of federal criminal jurisdiction over crimes involving non-Indians, since there was no general grant of citizenship to Indians until 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253.

Although none of these treaties involve the Salt River Indian Community, petitioner argues (Br. 31-32) that since he is a citizen of the United States, these early treaty provisions indicate that the federal government, not the tribe, should have jurisdiction over him. But although petitioner is certainly a citizen, he is also indisputably an Indian (see p. 1, *supra*). There is no indication in the text or legislative history of the 1924 Act that the extension of citizenship to Indians was in any way intended to affect the longstanding and subsequently reenacted “Indian-against-Indian” exception to federal jurisdiction, which does not turn on citizenship.

Section 25 of the 1834 Act was re-enacted as Sections 2145 and 2146 of the Revised Statutes in 1875, continuing the exception from federal jurisdiction for crimes committed by Indians against the person or property of Indians.¹¹ This general statutory scheme, originating in 1817, has continued in effect to the present day, with one important modification resulting from this Court’s decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883). In that case, one Lower Brule Sioux Indian was convicted in federal court of murdering another Lower Brule Sioux Indian, within Indian country. Relying on the Indian-against-Indian exception, this Court ruled that the federal courts had no jurisdiction over the crime, and the murderer was released. See also *Crimes Committed by Indians*, 17 Op. Att’y Gen. 566 (1883);¹² Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 958-962 (1975).

In reaction to *Crow Dog*, Congress enacted Section 9 of the Act of Mar. 3, 1885, ch. 341, 23 Stat. 385, the Major Crimes Act. See *Keeble v. United States*, 412 U.S. 205, 209 (1973). That statute set out a list of seven crimes that could be prosecuted in federal court if committed by an Indian on an Indian reservation, whether or not the victim was an Indian.¹³ This Court promptly

¹¹ Congress omitted that exception when it first re-enacted Section 25 of the 1834 Act. This omission was remedied in the Act of Feb. 18, 1875, ch. 80, 18 Stat. 318, which added the omitted language with the intent of keeping the exception in force without interruption. *Ex parte Crow Dog*, 109 U.S. at 558-559.

¹² This opinion, authored by the Solicitor General and later approved by the Attorney General, considered the murder of an Arapaho Indian by a Creek Indian within the Pottawatomie Reservation in the Indian Territory. Citing *Rogers* (and anticipating *Crow Dog*), the Attorney General determined that the federal courts probably lacked jurisdiction over the crime, but indicated that the “concerned” tribes, if they had an appropriate law “substantially conformable to natural justice,” would have jurisdiction to try the defendant, 17 Op. Att’y Gen. at 570.

¹³ The crimes were murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. Congress has since

upheld the validity of the Act in *United States v. Kagama*, 118 U.S. 375 (1886). As in *Rogers*, the Court made clear that the term "Indian" meant simply a member of some tribe, not necessarily of the tribe occupying the reservation where the crime occurred (118 U.S. at 383).

The statutes regarding criminal jurisdiction over Indians were re-enacted in 1909 and 1932, and consolidated in the Act of June 25, 1948, ch. 645, 62 Stat. 757, codified at 18 U.S.C. 1151-1153. *United States v. John*, 437 U.S. 634, 647, n.16 (1978). This recodification includes the Major Crimes Act (codified at 18 U.S.C. 1153) and Section 25 of the 1834 Act (codified at 18 U.S.C. 1152); it employs the words of the original provisions with only minor changes.¹⁴

This Court, and other courts, have held that in 18 U.S.C. 1151-1153 the term "Indian" includes any Indian in Indian country, regardless of particular tribal membership. *Kagama*, 118 U.S. at 383; *United States v. Dodge*, 538 F.2d 770, 785-787 (8th Cir. 1976) (conviction of nonmembers under Major Crimes Act); *United States v. Burland*, 441 F.2d 1199 (9th Cir.), cert. denied, 404 U.S. 842 (1971) (conviction of nonmember Indian

added other crimes to the list; the modern version is codified at 18 U.S.C. 1153.

The 1885 statute differentiated between Indian reservations located in a territory of the United States and those located in a State. In the first situation, the Indian would be prosecuted in the territorial courts. In the second, he would be prosecuted in the courts of the United States. See *Kagama*, 118 U.S. at 377. Congress later amended the statute to eliminate the territorial court provision, and then extended its applicability from Indian reservations to "Indian country." *United States v. John*, 437 U.S. 634, 647 n.16 (1978).

¹⁴ One change of significance occurred in the 1948 recodification. The statutes have always been applicable throughout "Indian country." That term had originally been defined to include the Indian territory generally, a definition that was deleted in the Revised Statutes; it was defined anew in the 1948 recodification. See *John*, 437 U.S. at 649 n.18. The new definition includes all land within the boundaries of Indian reservations, "dependent Indian communities," and Indian allotments. 18 U.S.C. 1151.

under 18 U.S.C. 1152). Cf. *State v. Allan*, 100 Idaho 918, 607 P.2d 426, 429 (1980) (State lacks jurisdiction over bribery committed by Quinault Indian on Coeur d'Alene Reservation); *Application of Monroe*, 55 Wash. 2d 107, 346 P.2d 667 (1959) (federal jurisdiction is exclusive over crime of aiding and abetting grand larceny committed by Blackfeet Indian on Yakima Reservation).¹⁵

A similar analysis of the historical materials discloses that Congress has consistently operated on the premise that, absent congressional action, the States have no jurisdiction over offenses involving Indians in Indian country.¹⁶ This Court has agreed,¹⁷ as have the state courts.¹⁸

¹⁵ Nothing in these decisions supports the suggestion in dissent (see Pet. App. B 1151) that 18 U.S.C. 1152 should be interpreted to use "Indian" to mean "any Indian" for purposes of federal jurisdiction, but to mean only "same tribe member Indian" for the Indian-against-Indian exception from federal jurisdiction.

¹⁶ Although originally state law did not run at all within the lands reserved to the Indians (see, e.g., *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)), this Court eventually made clear that crimes in Indian country that did not involve Indians were to be prosecuted in state courts. *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

¹⁷ See *United States v. John*, 437 U.S. at 651; *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962); *Williams v. Lee*, 358 U.S. at 220 n.5; *Williams v. United States*, 327 U.S. 711, 714 (1946); *Donnelly v. United States*, 228 U.S. 243, 270-272 (1913). As the Court explained in *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979):

[S]tate law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." * * * As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws * * * except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply."

¹⁸ See, e.g., *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958); *State v. Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct. App.

The major congressional action enabling the States to exercise such jurisdiction is "Public Law 280," the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.¹⁹ This statute granted to certain named States criminal jurisdiction over Indians in Indian country within those States, and authorized other States to acquire that jurisdiction through state legislation.²⁰ As this Court explained in *Bryan v. Itasca County*, 426 U.S. 373,

1988), review denied (July 2, 1988), cert. denied, No. 88-603 (June 26, 1989).

¹⁹ The statute was enacted on the usual premise—that the States have no jurisdiction over Indians in Indian country in the absence of a federal statute expressly granting it. See *Bryan v. Itasca County*, 426 U.S. at 376 n.2, 379-380 (quoting from H.R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953)).

More recent federal statutes also acknowledge the lack of state jurisdiction over Indians in Indian country. Thus, Section 1009 of the Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2141, added the offenses of "maiming" and "involuntary sodomy" to those listed in the Major Crimes Act in order to allow the crimes to be prosecuted in federal court as felonies, because otherwise a crime by an Indian against an Indian could be prosecuted only in tribal court. See H.R. Rep. No. 1030, 98th Cong., 2d Sess. 3498 (1984). At the same time, Congress deleted petty larceny from the Major Crimes Act because it "is unnecessary and virtually never asserted in light of tribal court jurisdiction over this offense." H.R. Rep. No. 1030, *supra*, at 3499. See also Act of May 15, 1986, Pub. L. No. 99-303, 100 Stat. 438 (adding offense of sexual molestation of a minor to the offenses of the Major Crimes Act, because otherwise "only the tribe has jurisdiction to punish the offense" H.R. Rep. No. 528, 99th Cong., 2d Sess. 5 (1986)).

²⁰ The Act is discussed in *Williams v. Lee*, 358 U.S. at 220-221: Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* has denied [citing Public Law 280 and other statutes.]

379 (1976), congressional concern over the inadequacy of criminal law enforcement on Indian reservations was a major motivation for the enactment of Public Law 280. Congress also recognized that although the States specifically identified in Public Law 280 sought to extend their criminal jurisdiction to Indian country, many other States lacked the resources to provide for effective law enforcement in Indian country.²¹ Accordingly, rather than making an outright grant of jurisdiction to all States in which Indian country is located, Public Law 280 merely gave federal consent to the exercise of such jurisdiction, leaving it to each State to determine its own "ability and willingness to accept such responsibility." H.R. Rep. No. 848, 93d Cong., 1st Sess. 6 (1953); S. Rep. No. 699, 83d Cong. 1st Sess. 5 (1953).²²

In Section 402(a) of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 79 (25 U.S.C. 1322(a)), Congress modified the 1953 Act to require the consent of the affected Indians to a State's assumption of jurisdic-

²¹ See H.R. Rep. No. 848, *supra*, at 6-8, referring to tribal concern over lack of state resources, and noting that several States were prepared to accept such jurisdiction only if they also received federal financial assistance to permit them to exercise it. S. Rep. No. 699, 83d Cong., 1st Sess. 5-7 (1953) is to the same effect. Since the State lacks authority to tax reservation Indians and their property (*Bryan v. Itasca County*, *supra*), it cannot finance its law enforcement efforts in that way.

²² Congress also recognized that the Enabling Acts of certain States required those States to disclaim jurisdiction over Indians in Indian country. Public Law 280 granted permission to such States to amend their laws to remove that disclaimer, so that they could assert the previously disclaimed jurisdiction. See *Washington v. Yakima Indian Nation*, 439 U.S. at 478-493; Goldberg, *Public Law 280: the Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 570 (1975) ("the disclaimers are more than protection against Indian loss of real property interests; they are congressional insulation against state jurisdiction over reservation Indians").

Arizona has such a disclaimer in its constitution, and has not accepted criminal jurisdiction over Indian country pursuant to Public Law 280. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 167 (1973); *Williams v. Lee*, 358 U.S. at 222-223, n.10.

tion.²³ Significantly, that consent must be "manifested by majority vote of the enrolled Indians [not just members of the "home tribe"] within the affected area of Indian country."²⁴

In short, the history of federal dealings with Indians in Indian country demonstrates that although Congress has authorized prosecution in the federal courts of major crimes committed by Indians against Indians in Indian country, it has at the same time consistently recognized and preserved the pre-existing tribal authority to prosecute offenses not enumerated in the Major Crimes Act committed in Indian country by one Indian against the person or property of another. See *Donnelly v. United States*, 228 U.S. at 270-272; *United States v. Wheeler*, 435 U.S. at 322-323. That preserved tribal authority has not been limited to the situation in which the offender is a member of the sanctioning tribe. Moreover, it has been consistently recognized that congressional action is necessary to give a State jurisdiction over any offenses in Indian country by or against Indians. Congress has consented to the exercise of that jurisdiction only when a State has indicated that it is able and willing to accept the responsibility it entails—as Arizona has not²⁵—and the affected Indians have agreed. Unless both entities are satisfied that the State can adequately maintain law and order on the reservation, the primary responsibility for doing so is to remain with the tribal courts, subject only

²³ Although the 1953 Act contained no express consent requirement, it did except certain tribes from its jurisdictional grant to the named States. The excepted tribes had opposed being subjected to state jurisdiction because, inter alia, of expressed fears that the State lacked the resources to provide for adequate law enforcement or that Indians would not be treated fairly in state courts. S. Rep. No. 699, *supra*, at 6-7.

²⁴ The statute also allowed a State that had acquired jurisdiction previously under Public Law 280 to retrocede that jurisdiction to the United States. See *Kennerly v. District Court of Montana*, 400 U.S. 423, 428-429 (1971).

²⁵ See note 19, *supra*.

to the limited supplementary jurisdiction of the federal and state governments described above.

II. THE TRIBAL COURT HAS THE PRIMARY INTEREST IN EXERCISING THIS JURISDICTION

Along with the consistent historical practice we have recounted, a balancing of the pertinent interests involved also points to the existence of tribal authority in cases such as this.²⁶

Although a reservation may be identified as the home of a particular tribe or tribes, it typically will contain a substantial number of resident Indians belonging to other tribes. For example, 181, or 8%, of the tribally-enrolled Indians resident on the reservation involved here, the Salt River Pima-Maricopa Reservation, are enrolled members of tribes other than the Pima or Maricopa Tribes. 2 Bureau of the Census, U.S. Dep't of Commerce, *1980 Census of Population*, Table 4, pt. 2, at 27 (1986) [hereinafter *1980 Census*].²⁷ Many of these persons undoubt-

²⁶ In the context of Indian affairs, this Court has frequently analyzed and balanced the relevant interests involved (usually for purposes of preemption analysis), with particular deference to "traditional notions of [tribal] sovereignty and * * * the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-218 (1987); *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698, 1707 (1989).

²⁷ Table 4 provides enrollment data for 201 of 278 listed tribes. Our analysis of these data indicates that at least 24,450 enrolled Indians live on reservations of tribes other than those in which they are enrolled. Based on those data and on information provided by the Department of the Interior, we note that the percentage of nonmember residents varies greatly from reservation to reservation. Although no resident members of enrolled tribes other than the "home tribe" are reported for three reservations, nine others have populations in which more than 40% of the enrolled residents are members of tribes other than the "home tribe". One quarter of the reservations with reported enrollment figures, i.e. 50 reservations, show more than 18% of their enrolled tribe residents are

edly have significant, long-term associations with the "home tribe" and the reservation, for example as spouses and children of tribe members—a matter of particular significance to traditional tribal court jurisdiction over offenses involving domestic violence. In addition, there is a substantial amount of intertribal visiting, especially at annual pow-wows. See S. Levine & N. Lurie, *The American Indian Today* 121 (1968); M. Wax, *Indian Americans: Unity and Diversity* 148-151 (1971). Thus, even if a reservation is identified with a particular "home tribe," members of other tribes are likely to constitute a significant fraction of its residents or possible offenders.²⁸

The existence of this substantial nonmember Indian population is important for two reasons. First, Indian country is often located in remote and sparsely populated areas.²⁹ In such areas, state law enforcement capacity is

members of tribes other than the "home tribe". Although the Navajo reservation, which is by far the largest one, has a very low percentage—2%—of nonmember enrolled Indian residents, that percentage represents 1,920 persons. Overall, of the reservations for which enrollment figures are given, the average percentage of nonmember resident Indians is about 14%; fully one half of all tribes have 10% or more of nonmember resident Indians.

²⁸ The other categories of "Indian country"—dependent Indian communities and allotments (see note 14, *supra*)—may not even have a "home tribe." The term "dependent Indian community" is derived from *United States v. McGowan*, 302 U.S. 535 (1938), where the Court held that the Reno Indian Colony was Indian country for the purposes of federal laws forbidding the bringing of liquor into Indian country. That community consisted of 28.38 acres of land bought by the federal government in 1917 and 1926 and occupied by several hundred Indians previously scattered throughout Nevada. See *United States v. John*, 437 U.S. at 648.

Similarly, allotments are tracts of land held by the United States in trust for individual Indians. See *United States v. Mitchell*, 445 U.S. 535, 540-546 (1980). The provision concerning allotments, 18 U.S.C. 1151(c), comes into force only when an allotment is not within the boundaries of an Indian reservation, since it otherwise would be included under Section 1151(a).

²⁹ See Bureau of the Indian Affairs, U.S. Dep't of the Interior *Indian Land Areas*, Map (1971); *Report on Federal, State, and*

likely to be limited and unable to cope effectively with the added burdens that would be imposed if state jurisdiction were extended to cover non-major crimes committed by the substantial population of nonmember Indians.³⁰ Federal law enforcement capacity is also likely to be limited (see Report of the U.S. Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* 145 (GPO 1981)), and, in any event, devoted to controlling major crimes and crimes involving non-Indians.³¹ The tribe, in contrast, has the primary interest in main-

Tribal Jurisdiction, Task Force Four: Federal, State, and Tribal Jurisdiction 15-17 (Comm. Print 1976) (prepared for American Indian Policy Review Commission) [hereinafter *Task Force Report*]; cf. Bureau of the Census, U.S. Dep't of Commerce, *We, The First Americans* 13-14 (of housing units on reservations in 1980, 24% lacked complete plumbing facilities, 56% lacked a telephone, and 16% lacked electric lighting).

Of course, not all reservations are isolated. For example, the Port Madison Indian Reservation, the residence of the Suquamish Indian Tribe, respondent in *Oliphant*, is located on Puget Sound opposite Seattle; the Court's description of the reservation (435 U.S. at 191 & n.1) suggests that it is in many respects almost a suburb of Seattle. Although the Salt River Pima-Maricopa Indian Community involved here has a far greater Indian population than the Port Madison Reservation (see *1980 Census*, Table 4, pt. 2, at 25, 27), it is also quite close to an urban center—Phoenix, Arizona. *Indian Land Areas Map, supra*. Nevertheless, we suggest that the isolated Indian community is more the norm than the "suburban" one.

³⁰ In situations where the State is able to assume the added burdens and the tribe consents to that assumption, Congress has provided in Public Law 280 a means for the transfer of the authority to the State.

³¹ Of course, in light of *Oliphant*, federal authorities must assume the general law enforcement responsibility where the offense is committed by a non-Indian against an Indian. That does not, however, mean that federal courts and prosecutors are best suited to the job (see *Oliphant*, 435 U.S. at 212; *Task Force Report* 37-38), or that federal jurisdiction should be extended, despite the direct statutory prohibition in 18 U.S.C. 1152, to cover all offenses committed by one Indian against another.

taining law and order within its domain, and reliance upon the tribal courts to do so furthers the federal interest in strengthening and improving tribal self-government. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-144; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978).³²

Moreover, in light of the historical evidence that the federal government has never asserted jurisdiction, outside the Major Crimes Act, over crimes by Indians against the person or property of other Indians in Indian country, and that state jurisdiction over such crimes does not exist, there is no assurance that non-major offenses by nonmember Indians against other Indians are presently subject to *any* legal sanctions if they cannot be prosecuted by the tribe.³³ This possible jurisdictional gap distin-

³² In recognition of the impracticality of relying solely on federal or state law enforcement, the Department of the Interior has, by regulation, established "courts of Indian offenses" on certain reservations. 25 C.F.R. Pt. 11. These courts are designed to provide "adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law." 25 C.F.R. 11.1(b). They are, by regulation, given jurisdiction over crimes committed "by any Indian, within the reservation or reservations for which the court is established." 25 C.F.R. 11.2(h).

The courts of Indian offenses were first established in 1883, pursuant to the general authority of Rev. Stat. §§ 463 and 465, now codified at 25 U.S.C. 2 and 9, and have continued to exist on some reservations to the present day. See *United States v. Clapox*, 35 Fed. 575 (D. Ore. 1888); F. Cohen, *Handbook of Federal Indian Law* 333-335 (1982). These courts have not been expressly authorized by Congress, but Congress has recognized their existence for more than 100 years. See, e.g., Section 301 of the Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 78 (25 U.S.C. 1311) (directing the Secretary of the Interior "to recommend to the Congress * * * a model code to govern the administration of justice by courts of Indian offenses on Indian reservations"). This Court has also acknowledged the existence of these courts. *Williams v. Lee*, 358 U.S. at 222; *Wheeler*, 435 U.S. at 327; *Oliphant*, 435 U.S. at 196.

³³ There is also the related possibility that federal prosecutors may be motivated to avoid the gap by overcharging—bringing

guishes this case from the situation in *Oliphant*, where the absence of tribal jurisdiction over nonIndians simply meant that their offenses, if committed against Indians were subject to federal law, or if committed against non-Indians to state law. In contrast, here the lack of any clear alternative jurisdiction means that the absence of tribal authority to try nonmember Indian offenses would seriously threaten the maintenance of law and order on the reservation, and thus the health and welfare of all residents who would suffer from lawlessness on the reservation.³⁴ Cf. *Brendale v. Confederated Tribes & Bands of Yakima*, 109 S. Ct. 2994, 2997, 3007, 3014 (1989) (recognizing that under *Montana v. United States*, 450 U.S. 544, 566 (1981), tribal retained sovereignty includes power to exercise civil authority over non-Indians to restrain conduct that "threatens or has some direct effect on the [tribe's] * * * health or welfare").³⁵

charges under the Major Crimes Act for conduct that would normally be prosecuted under statutes with less severe penalties.

³⁴ It is of course possible for Congress to fill the jurisdictional gap by expressly delegating to the tribal courts jurisdiction over non-major crimes committed by members of other tribes; it is our submission that it is unnecessary for it to do so, since this jurisdiction has never been removed. It is therefore unnecessary to subject the residents of Indian country to the serious dislocations in law and order that could be anticipated in the interim between a decision that the jurisdiction does not exist and the restoration of a comprehensive system of criminal law enforcement.

Moreover, the express delegation procedure might arguably mean that tribal courts would be considered an "arm of the Federal Government" for double jeopardy purposes (see *United States v. Wheeler*, 435 U.S. at 328). Tribal prosecution for a lesser included offense could thus bar subsequent federal prosecution under the Major Crimes Act, and "important federal interests in the prosecution of major offenders on Indian reservations would be frustrated" (*id.* at 331 (footnotes omitted)).

³⁵ Alternatively, it could be argued that the tribe retains, as an inherent aspect of its limited sovereignty, the right to condition the entry of Indians into its territory on their compliance with the tribal criminal laws, since—in order to avoid the jurisdictional gap—that condition is essential to the preservation of the tribe's

It is true that in *Wheeler*, 435 U.S. at 326, the Court observed, in rejecting the double jeopardy claim of a tribe member who had previously been convicted of a lesser included offense by the tribe, that Indian tribes have been divested of sovereignty in matters involving the relations between the tribe and nonmembers of the tribe, in contrast to "the powers of self-government, including the power to prescribe and enforce internal criminal laws, * * * [which] involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." See also *Montana v. United States*, 450 U.S. at 564 ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"). But neither *Wheeler* nor *Montana* involved a situation (1) in which Congress had consistently acted on the premise that the asserted tribal jurisdiction had not been divested, (2) the State had no jurisdiction, and (3) the possibility of a jurisdictional gap threatened essential interests in peace and security shared by the tribe members with all other residents of the community. We therefore submit that the dicta in those cases should not be extended to govern the decision here.

Finally, as this Court explained in *Kagama*, 118 U.S. at 384, the federal assertion of criminal jurisdiction in Indian country was designed to protect the Indians from their non-Indian neighbors, based on the fear that they would not be treated fairly in state courts. That risk of prejudice is based not on membership in any particular

peaceful enjoyment of its reservation. The Community need not and obviously cannot tolerate within its boundaries the presence of persons who are beyond the reach of any law for a substantial category of offenses. Subjecting non-Indians to that same condition is not essential, because they are subject either to state or federal law for their offenses. Cf. *Brendale v. Confederated Tribes*, 109 S. Ct. at 3009-3017 (opinion of Stevens, J., joined by O'Connor, J.) (relying for determination of tribal jurisdiction on existence of tribal power to exclude).

tribe, but simply on the individual's perceived "Indian-ness".

In enacting Public Law 280, Congress evidently concluded that the risk of prejudice had subsided so that States willing to devote the resources to extend their jurisdiction to Indian country should be permitted to do so. Nevertheless, the express exclusion of certain Indian country (see note 23, *supra*) and the amendment of the Public Law 280 procedures to require the affected Indians' consent to the assumption of state jurisdiction suggest that Congress also wished to leave to the Indian themselves the ultimate decision as to whether State authorities could be relied on to provide for fair and adequate enforcement authority on a particular reservation.³⁶ Arizona has not to date concluded that it is ready to accept Public Law 280 jurisdiction, and thus there has been no consent by the majority of the Indians affected to the assertion of such jurisdiction. Petitioner Duro's claims that it would be unfair to subject him to tribal court jurisdiction must accordingly be balanced against this history of reluctance to subject Indians to state court jurisdiction. To those claims we now turn.

III. APPLYING TRIBAL COURT JURISDICTION TO PETITIONER DOES NOT DEPRIVE HIM OF ANY CONSTITUTIONAL OR STATUTORY RIGHT

Petitioner contends that subjecting him to the jurisdiction of the tribal court of a tribe different from his own, in circumstances in which a similarly situated non-Indian would not be subject to that court's jurisdiction, denies him equal protection of the laws and due process.

Indian tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); see *Talton v. Mayes*, 163

³⁶ As recently as 1976, the *Task Force Report* stated at 15 as the "almost universal Indian viewpoint" that existing conditions continued to confirm the observation in *Kagama*, 118 U.S. at 384: "Because of the local ill feeling, of the people, States where [the Indian tribes] are found are often their deadliest enemies."

U.S. 376 (1896). Accordingly, in Section 2 of the Indian Civil Rights Act of 1968, 25 U.S.C. 1302, Congress enacted comparable standards to regulate tribal actions; 25 U.S.C. 1302(8) requires that no tribe shall "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The equal protection provision requires the tribal court to treat everyone *within its jurisdiction* equally; but it does not require the tribal court to treat one group within its jurisdiction like another group that is not. So long as the tribal court treats all Indians equally, it does not violate the Indian Civil Rights Act equal protection provision simply because its jurisdiction extends to Indians who are not tribe members but not to non-Indians. To the extent that a tribal court treats non-Indians differently than it does nonmember Indians, it does so only because the former are not within its jurisdiction under *Oliphant*. Petitioner, who has not yet been tried by the tribal court, does not claim that he has in fact been deprived of due process by the court's procedures. If he has such a claim at some point, he has a remedy for any violation of the requirements of basic fairness which Congress has imposed on the Indian tribes in 25 U.S.C. 1302 through a writ of habeas corpus in federal court under 25 U.S.C. 1303. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).³⁷

Accordingly, any equal protection or due process issues in this case arise under the Federal Constitution, not the Indian Civil Rights Act. Petitioner is treated differently

³⁷ There has been considerable criticism of the fairness of some tribal courts. See, e.g. S. Brakel, *American Indian Tribal Courts*, in *Indians and Criminal Justice* 147 (L. French ed. Allanheld, Osmun & Co. 1982); cf. *Greywater v. Joshua*, 846 F.2d 486, 488-489 (8th Cir. 1988). Moreover, Congress is considering a proposed amendment of the Indian Civil Rights Act of 1968 to provide for a right of action in federal court for individuals aggrieved by violations of the Act (S. 517, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S2186-S2192 (daily ed. Mar. 6, 1989)).

for purposes of *federal* jurisdiction than a similarly situated nonIndian, simply because he is a member of an Indian tribe. That difference in treatment has not in fact prejudiced petitioner, who is charged with a violation of the tribal code of misdemeanors,³⁸ rather than the homicide with which he was originally charged in federal court. Pet. App. B 1138. Cf. *Antelope*, 430 U.S. at 644, where the application of federal law to an Indian resulted in harsher treatment than that accorded a nonIndian subject to state law.³⁹

Petitioner is subject to tribal court jurisdiction not because he is an Indian by race, but because he is an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians. That membership is a sufficient indication of his self-identification as an Indian, with traditional Indian cultural values, to make it reasonable to subject him to the tribal court system, which within the limitations of fundamental fairness imposed by the Indian Civil Rights Act, implements traditional Indian values and customs. That identification carries with it benefits as well as burdens—because of it, petitioner is in many respects treated somewhat differently than non-Indians.⁴⁰ Moreover, petitioner's tribal identification is

³⁸ Sentences imposed by tribal courts may not exceed one year in jail and a fine of \$5000. 25 U.S.C. 1302(7).

³⁹ The Court in *Antelope* emphasized that Antelope was treated the same as all citizens in federal enclaves, and thus "enjoy[ed] the same procedural benefits and privileges as all other persons within federal jurisdiction" (430 U.S. at 648). To the extent petitioner's claim is that he should not be excluded from federal court because he is an Indian, it is essentially the converse of the claim in *Antelope*. Nevertheless, as we explain below, the Court's analysis in *Antelope* of the rationale for distinctive treatment of Indians applies as well to petitioner's claim.

⁴⁰ For example, Indian Health Services benefits are available to all enrolled Indians, and their minor children, living within a service area—not just to members of the tribe located within that area. 42 C.F.R. 36.12(a). Similarly, contractors under the Indian Self-Determination and Education Assistance Act are required to give preferences for employment, training, and subcon-

voluntary, since he can at any time formally resign his membership in the tribe, and thenceforth be treated like any other nonIndian citizen. See *Antelope*, 430 U.S. at 646-647 n.7.

There is, of course, an ancestral element in the tribal identification; petitioner cannot become a member of the Pima-Maricopa Tribe. There is, however, nothing fundamentally unfair in subjecting him, in common with other resident Indians, to the jurisdiction of the tribal courts of that tribe, so long as those courts comply with the requirements of the Indian Civil Rights Act. Petitioner's position is not fundamentally different from that of the alien resident in a foreign country, who must comply with the foreign country's criminal laws and subject himself to the jurisdiction of its courts, even though he cannot participate in its political processes.⁴¹

tracting to enrolled Indians generally, without regard to tribal membership. 25 U.S.C. 450b, 450e(b), 25 C.F.R. 271.444. With respect to certain other Interior Department contracts, 25 U.S.C. 47 mandates a preference for Indians generally, and the regulations implementing that provision specifically prohibit discrimination based on tribal affiliation. 48 C.F.R. 1452.204-71(a). Regulations of the Office of Federal Contract Compliance also provide that a federal contractor who gives a preference to Indians for employment on or near a reservation is not in violation of the equal employment opportunity clause of its contract so long as such a preference does not discriminate on the basis of tribal affiliation. 41 C.F.R. 60-1.5(6).

The Indian preference policy is intended, in part, to give Indians greater participation in their own self-government and to reduce the negative effect of having non-Indians administer matters that affect tribal life. *Morton v. Mancari*, 417 U.S. 535, 541-542 (1974). These preferences tend to increase the number of nonmember Indians residing on Indian reservations. A ruling that many of the persons drawn to the reservation by the Indian preference policy are immune from tribal criminal law would tend to undermine the efficacy of this policy in promoting tribal self-government.

⁴¹ Although most such resident aliens can, unlike petitioner, anticipate that at some point they can be admitted to citizenship, the requirement of compliance with the local law is not dependent on that anticipation. Thus, persons in this country on student visas or on special work permits may never become eligible for

This Court has repeatedly recognized that the federal government may pass laws treating Indians differently from non-Indians, and that those laws do not constitute discrimination based on race, but are based on the peculiar historical and legal relationship between the United States and the Indian tribes.⁴² Tribal jurisdiction over non-member Indians reflects the patterns in 18 U.S.C. 1151-1153 and likewise does not constitute invidious racial discrimination.

In *Morton v. Mancari*, *supra*, non-Indian employees of the Bureau of Indian Affairs challenged the employment preference for Indians in the Bureau pursuant to Section 1 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461). This Court upheld the preference as violating neither the Equal Employment Opportunity Act of 1972 nor the Due Process Clause of the Fifth Amendment. The Court stated, 417 U.S. at 554 (footnote omitted):

The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. * * * In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.

Significantly, the Court in *Mancari* approved the preference for any enrolled member of an Indian tribe, regardless of particular tribal membership, for BIA employment with his own tribe or another. The decision thus stands for the proposition that it is proper for relevant purposes to treat tribal Indians as a group differently from other persons, and that it is not necessary

citizenship, but are nevertheless subject to our laws and their enforcement processes.

⁴² See *Williams v. Lee*, 358 U.S. 217, 219 n. 4 (citations omitted): "The Federal Government's power over Indians is derived from Art. I, § 8, cl. 3, of the United States Constitution, and from the necessity of giving uniform protection to a dependent people."

that distinctions be drawn on the basis of membership in the particular tribe that is specifically involved.

Similarly, in *Antelope*, 430 U.S. at 646-647 & n.7, this Court observed that 18 U.S.C. 1151 and 1153 apply to enrolled tribal members, not simply to members of the "Indian race"; they are accordingly "based neither in whole nor in part upon impermissible racial classifications." That rationale fully applies here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
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v.

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Salt River Department of Public
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R. MANUEL, SR., Chief Judge of the Salt
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**ON WRIT OF CERTIORARI TO THE UNITED STATES
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**MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME
AND BRIEF OF THE STATES OF NEW MEXICO,
SOUTH DAKOTA AND WASHINGTON AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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AND WASHINGTON AS AMICI CURIAE
IN SUPPORT OF PETITIONER

Amici respectfully move for leave to file the attached
Brief Out of Time in Support of Petitioner, pursuant to

Rule 36.4 of the Rules of this Court. After a decade of vigorous participation in each case before this Court when the scope of tribal jurisdiction was at issue, *amici* inadvertently neglected in this case to properly pursue and coordinate the filing of a timely brief. This neglect has resulted in a situation where the argument of the States ~~are~~ not briefed for the Court. Nevertheless, the issue to be decided in this case will undeniably affect the jurisdiction of all States with Indian Reservations, as in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, 106 L.Ed 2d 343 (1989). For this reason, and to provide assistance to the Court not otherwise available, this Motion and *amici* brief are submitted.

The United States, the Salt River Pima-Maricopa Indian Tribe and numerous *amici* Tribes have filed briefs in support of tribal jurisdiction. Obviously these briefs do not reflect the arguments or the vital interests of *amici* States, noted in the submissions in *Oliphant*, *Montana*, and *Brendale*. Nor could they be expected to advocate or protect jurisdiction arguably vested in any State. On the other side, only Petitioner, with Court appointed counsel, representing an individual charged with a crime, with distinct ethical and other obligations readily distinguishable from the Attorneys General of the respective States, opposes this quest for expanded tribal jurisdiction. While Petitioner has briefed the question presented admirably, Court appointed counsel cannot represent the interests of *amici*. Nor should he be expected to bring a perspective to

this Court backed up by a decade of involvement in litigation of this type, similar to that which the United States has filed against him. State interests are not any less substantial, because in this instance, only non-member Indians, rather than non-Indians are involved. *Fletcher v. Peck*, 6 Cranch 87, 147 (1810).

Petitioner has consented to the filing of this brief. For these reasons, considerations related to those noted in cases such as *Williams v. Georgia*, 348 U.S. 957, 349 U.S. 375, 380-81 (1955) and *Bob Jones University v. United States*, 456 U.S. 922 (1982), 459 U.S. 812 (1983) also lend support to this Motion.

The majority of other States ordinarily interested in Federal Indian Law issues, could not be notified or requested to join in this Motion or brief because of time restrictions.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of *amici* is set forth in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

In recent years, *amici* and other States have vigorously participated in the briefing and argument of cases before this Court where similar issues have been raised. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845 (1985) and, most recently, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, ___ U.S. ___, 106 L.Ed 2d 343 (1989), are representative of this effort. In general, the *Opinions* of this Court in each of these cases reflect historical arguments and documentation that *amici* found persuasive. Importantly, the United States always disagreed. This past position of *amici* and the United States is significant now in several respects.

ARGUMENT

[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors to the United States from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. *Fletcher v. Peck*, 6 Cranch at 147; *Oliphant*, 435 U.S. at 209 (emphasis as in original).

We would like to begin, as Mr. Justice Stewart did in oral argument in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), with what is necessary to decide in this case and what is not. Tr. of Oral Argument, at 29, *Oliphant*. Here, as in *Oliphant*, we submit the question is

whether or not Indian Tribes have the criminal jurisdiction claimed. The question is not, if they do not, who does? But, the United States seeks to put the cart before the horse, as it has in other cases. According to the United States, if Indian Tribes are not allowed to exercise criminal jurisdiction over non-member Indians, a jurisdictional void, "beyond any legal system" would "seriously threaten the maintenance of law and order" on the reservations. Br. for U.S. at 8. This is a serious charge, so this is where we will begin, and even here, the United States misses the mark.

Amici and other States are very much involved in law and order issues on nearly all Indian reservations. There are many non-Indians on Indian reservations today. Brief for the States, Appendix A, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, 106 L.Ed 2d 343 (1989). In nearly all reservations, the interests of many of these non-Indians are indistinguishable from those of non-member Indians. There is no question that these individuals are subject to state jurisdiction and prosecuted when necessary.

In States without Public Law 280 jurisdiction (Act of August 15, 1953, ch 505, 67 stat. 588), such as North Dakota and South Dakota, non-member Indians are subject to State jurisdiction.¹ The record in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) establishes that the Chippewa defendants were charged by North Dakota

¹ This is apart from the fact that South Dakota also asserts Public Law 280 jurisdiction on highways through Indian country. The highway claim has been recently upheld in *State v. Onihan*, 427 N.W. 2d 365 (S.D. 1988) and federal trial court, *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989) (Appeal Pending).

while *Greywater* was pending in the lower court. *Greywater* at 490 n. 3. See Appendix A, *infra*. And in South Dakota, evidence of the State's involvement in law enforcement on Indian reservations with regard to non-member Indians is presently before the South Dakota Supreme Court in a case involving the arrest of a member of a Tribe that has not been federally recognized. *State v. Daly*, No. 16719. Similarly, after a federal district ruling that a member of a terminated Tribe was not an Indian for federal criminal law purposes, *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), South Dakota assumed jurisdiction and is prosecuting in State court. See *State v. St. Cloud*, S.D. Sup. Ct. No. 16899 (Intermediate Appeal Pending). In fact, *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) attests that at least until 1962, many States were exercising criminal jurisdiction even over members of the tribes within their respective reservations.

Moreover, many, if not most, reservation offenses prosecuted by other States, are sanctioned by Public Law 280, a fact that the United States obscures in its portrait of a potential jurisdictional void. As a result, in these Public Law 280 States, such as Washington, the jurisdictional void does not even arguably exist. For this Court to sanction Tribal criminal jurisdiction over non-member Indians would only further complicate a difficult system that has, nevertheless, worked relatively well in these States for decades.

In other instances, where jurisdictional impediments have previously existed, cooperative agreements have been utilized to solve many day to day problems. Certainly, such agreements appear more promising than the alternative urged by the United States in this case. Other

solutions are also possible.² State courts can review older decisions in light of *Oliphant, Montana*, and this case. *Washington v. Confederated Tribes*, 477 U.S. 134 (1980) and *Rice v. Rehner*, 463 U.S. 713 (1983) have also recently refined the principles of tribal self-government applicable here. And the home tribe of an enrolled member might arguably retain some personal jurisdiction in a situation like the one presented here. Or at the end of the day, Congress might expand the role of the United States or further clarify or remove other lingering jurisdictional impediments. One thing is certain. The suggestion of the United States that this Court recognize tribal criminal jurisdiction over non-member Indians to fill a void that does not exist, (whether it is limited to enrolled non-member Indians or to the more novel significant "contacts" Indians of the Court of Appeals), promises only more confusion. The fact that such confusion should exist at the expense of the Constitutional Rights of any citizen of the United States, not a member of the prosecuting tribe, further undermines this suggestion. All of which brings us back to what, we submit, is necessary to decide in this case.

1. In recent years, *amici* and other States have vigorously participated in the briefing and argument of cases before this Court where similar issues have been raised. *Oliphant, Montana, National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845 (1985) and, most recently, *Brendale*, are representative of this effort. In general, the Opinions of this Court in each of these cases reflect historical arguments and documentation that *amici*

² See *Keeble v. United States*, 412 U.S. 205 (1973).

argued and the Court found as persuasive. Importantly, the United States always disagreed. In fact, the United States formally resisted and rejected each argument of substance in each case (except *Brendale*) until this Court announced its Opinion. Even then, the United States acknowledged only the most narrow application, while at the same time it renewed all remaining arguments in related litigation then pending. This past position of *amici* and the United States is significant now in several respects.

a. First, the submission by *amici* that the analysis and principles set forth in *Oliphant*, *Montana*, and *Brendale* are controlling here, while briefly made, is therefore most definitely not lightly advanced or briefly considered. Over a decade of effort in these cases substantiates this position. Out of time, *amici* can only reiterate that the reasoning and holdings of each of these cases makes clear that Indian Tribes were not intended to exercise criminal jurisdiction over non-member Indians. In this regard, the opinion of Judge Lay in *Greywater*, is supportive of *amici's* view and worthy of this Court's consideration.³

b. The "Indian v. Indian" exception argument of the United States does not even approach the "express congressional delegation" this Court has properly insisted on

³ The *Greywater* record also accurately reflects the realities of life in "Indian Country" for anyone whose perspective is so distant as to need or appreciate a closer look. See the uncontested affidavit of Defendant Mary Jo Greywater, Appendix, 163, *Greywater*, and the Brief of Appellant, 8-10, *Greywater*, that sets forth Defendant Joshua Greywater's testimony at the hearing regarding this same tribal judge. Petitioner has lodged copies of all of the *Greywater* appellate briefs and the appendix with the Office of the Clerk.

in the past, as a condition precedent to a recognition of expanded tribal jurisdiction. *Oliphant*, 435 U.S. at 208, *Montana*, 450 U.S. at 564, and *Brendale*, 106 L.Ed 2d at 346. The United States has argued around this principle before, and hopefully this will be the last such argument to this Court, at least in the absence of any heretofore undisclosed treaty related claim. (The Pima-Maricopa Tribe appears to be a non-treaty tribe occupying an executive order reservation.) The almost "bright line" established by *Oliphant*, *Montana* and *Brendale* promises, in the foreseeable future, to bring to a conclusion much of this and other related jurisdiction litigation.

c. Whatever else Congress might have intended to accomplish by the "Indian v. Indian" exception, (something far short of the required "express congressional delegation" in any event), one other point is unmistakably clear. The subsequent Jurisdictional history painted by the United States ("clear historical pattern") is not nearly as clear as the United States would have this Court now believe.

(1). The Reply Brief of Petitioner highlights the authorities contrary to the United States' position, including Felix Cohen, at 3-4, 12-18. Additionally, *amici* would note that even the documentation cited by Cohen makes clear that as early as 1904 tribal jurisdiction was limited in Courts of Indian Offenses to Indians "belonging to the reservation". Regulations of the Indian Office, F. Cohen, *Handbook of Federal Indian Law*, at 359 (1942 ed.)

(2). Later and more importantly, a limitation of tribal jurisdiction to tribal members was continued and routinely reflected in the tribal constitutions adopted

after the Indian Reorganization Act of 1934, 48 Stat. 984. Typically, such a constitution would provide:

Section 1. The judicial powers of the. . . Tribe shall be vested in court or courts which the tribal council may ordain or establish.

Section 2. The judicial power shall extend to all cases involving *only* members of the. . . Tribe, arising under the constitution and by-laws or ordinances of the tribe, and to other cases in which all parties consent to jurisdiction. (emphasis added).

Surely, the United States should be aware of these tribal constitutions. The Secretary of Interior, as a matter of record, was required to approve each one pursuant to the Indian Reorganization Act.

At least until 1954, when the Department of Interior was requested to construe a similar limitation, the response was brief and to the point:

. . . a penal ordinance providing for the prosecution of *Indian nonmembers* who are guilty of violating any law, rule or ordinance for the protection of game and fish on the reservation.

This ordinance reveals that it was adopted pursuant to Article VI, Section 1, Subsection (a) of the constitution. Subsection (a) does empower the tribe to enact ordinances for the protection and conservation of fish and game but *neither that nor any other provision of the constitution confers jurisdiction on the tribe to enforce criminal sanctions against nonmembers of the tribe*. Subsections (1) and (n), after close scrutiny, do not appear to authorize the tribe to impose punitive provisions on nonmembers for fish and game violations subject to the review of the Secretary, for they *transcend the ordinary scope of*

authority of the Indian tribe. Therefore, one basic reason why the ordinance is ineffective, rather than that it has failed to be approved and ratified by the Superintendent and Secretary, is that it was *beyond the constitutional power* of the tribe.

2 Op. Sol. 1637, 1638 (1954) (emphasis added).

In this regard, South Dakota notes the assertion in the Brief Amici Curiae on Behalf of Six American Indian Tribes that the Oglala Sioux Tribe "exercises criminal jurisdiction over all Indians within the reservation, members and nonmembers alike". Brief Amici Curiae at 5. The current Constitution of the Oglala Sioux Tribe, similar to the one set forth above, *on its face*, prohibits this jurisdiction claim:

ARTICLE V – JUDICIAL POWERS

SECTION 1. The judicial powers of the Oglala Sioux Tribe shall be vested in court or courts which the tribal council may ordain or establish.

SECTION 2. The judicial power shall extend to all cases involving *only* members of the Oglala Sioux Tribe, arising under the constitution and by-laws or ordinances of the tribe, and to other cases in which all parties consent to jurisdiction.

Constitution of Oglala Sioux Tribe, at 5 (emphasis added).⁴ How this fact could have escaped *amici* Tribes' attention

⁴ In order to prudently place assertions dealing with jurisdiction such as this in perspective, in the absence of a response *ad infinitum* from *amici*, reference could be made to reported decisions in representative jurisdictions. These cases accurately reflect jurisdictional history. See for example, *Eugene Sol Louie*

(Continued on following page)

is difficult to imagine especially in light of the habeous corpus petitions on record locally on this issue. Why a tribal constitutional prohibition is seemingly being ignored by the Tribe itself is more readily understandable in light of the general state of affairs in Indian country described in the 1989 Congressional materials set forth in Appendix C, *infra*, which brings us to our last point. A problem exists, anticipated by this Court over a decade ago, that time has only served to compound: Namely, that the Indian Civil Rights Act has not transformed Indian reservations into the bastions of fundamental fairness that the United States and *amici* Tribes would have this Court envision. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 82 (White, J. dissenting) (1978).

2. Perhaps *amici* should have expected that the United States and others would call upon the 1886 "local ill feeling" "deadliest enemies" *Kagama* characterization of State government to support expanded tribal jurisdiction. *Brief for the United States*, 24, 25 n. 36, citing *United States v. Kagama*, 118 U.S. 228 (1886). After all, *amici* have never really responded, as we should have, to this approach and a response is long overdue. In point of fact, for at least four decades, the concern in Congress over the lack of fundamental fairness in Indian country, has focused on the actions of *tribal governments*, not *State governments*. See *Washington v. Yakima Indian Nation*, 439 U.S. 463

(Continued from previous page)

v. United States, 274 Fed. 47 (9th Cir., 1921), *State v. Monroe*, 83 Mont. 556, 274 Pac. 840 (1929) and other cases cited in F. Cohen, *Handbook of Federal Indian Law*, 359 (1942 ed.), *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) and *Dixon v. Rhay*, 396 F.2d 761 (9th Cir. 1968).

(1979), *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *Santa Clara Pueblo v. Martinez*. Most recently, this concern surfaced in the context of a 1988 Report from the United States Department of Justice, Office of Legislative and Intergovernmental Affairs. *Petitioner's Reply Brief*, Appendix 4a. This ten page *federal* report describes the situation on reservations as "critical" and concludes that unless remedied:

... individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in *theory* but not in *practice*.

Petitioner's Reply Brief, Appendix 5a, 6a. After the remedy, S. 517, was introduced on March 6, 1989, and after reviewing the supporting *federal* documentation, *amici* and other States passed a resolution in support of the need for this or similar legislation. See Appendix B, *infra*. *Amici* can add nothing to emphasize the concern reflected in the ten pages of Congressional Record dealing with the introduction of this legislation. See Appendix C, *infra*. It reveals a system that, at best, is far removed from that described by the United States and other *amici* Tribes. *Amici* would respectfully submit that both the individuals and the system, and this Court as well, would be better served if the United States directed as much attention to the questions raised in the Congressional Record as it does to the century old "local ill feeling" "deadliest enemies" *Kagama* argument. Perhaps then, the opposition of Tribal governments, that has contributed to blocking legislative efforts on this issue, can be overcome. In the meantime, nothing submitted in this case to date should lead this Court to conclude that the system should be

expanded at the expense of Petitioner's or any other non-member Indian's Constitutional Rights by subjecting them to tribal criminal jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Attorney General
State of New Mexico

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APPENDIX A

ATTORNEY GENERAL

STATE OF NORTH DAKOTA
State Capitol
Bismarck, North Dakota 58505
701-224-2210

Seal

Nicholas J. Spaeth
Attorney General

November 21, 1989

Honorable Roger A. Tellinghuisen
Attorney General
State Capitol
Pierre, SD 57501

Dear Attorney General Tellinghuisen:

Last year the Eighth Circuit Court of Appeals concluded that a tribal court's criminal jurisdiction is limited to tribal members. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). You have requested information regarding the effect of *Greywater* on law and order on Indian reservations in North Dakota. In particular, you want to know if *Greywater* has created a jurisdictional void.

There are four Indian reservations in North Dakota - the Fort Totten Reservation (also known as the Devils Lake Sioux Reservation), the Turtle Mountain Reservation, the Standing Rock Reservation, and the Fort Berthold Reservation. Most of the Fort Totten Reservation is in Benson County. Since *Greywater* the Benson County State's Attorney has prosecuted in state courts Indians who are not members of the Devils Lake Sioux Tribe but who have committed crimes on the reservation. All of the Turtle

Mountain Reservation is in Rolette County. Since *Greywater* the Rolette County State's Attorney has not been presented with a situation in which she must decide whether or not to prosecute a non-member Indian in state court. Nonetheless, were she presented with that situation she has said she would prosecute. The Standing Rock Reservation is in Sioux County. Since *Greywater* non-member Indians had been prosecuted, not in tribal court, but in a "CFR court" established pursuant to 25 C.F.R. Part 11. Were there no such court the Sioux County State's Attorney has said he would prosecute non-member Indians in state court. The Fort Berthold Reservation lies in part of five different counties. Only the state's attorneys from McKenzie County and Mountrail County have been presented with the decision whether or not to prosecute an Indian who is a non-tribal member for a crime committed on the reservation. The state's attorneys from these two counties prosecute such Indians. Furthermore, a "CFR court" has been established on the Fort Berthold Reservation to provide jurisdiction over non-members.

In summary, a jurisdictional void does not exist on reservations in North Dakota. The *Greywater* decision has not led to a breakdown of law and order on North Dakota reservations. Furthermore, I have not heard that there has been a breakdown in law and order on reservations elsewhere within the Eighth Circuit since *Greywater*.

Sincerely,

/s/ Nicholas Spaeth
Nicholas J. Spaeth

pg

APPENDIX B

CONFERENCE OF WESTERN ATTORNEYS GENERAL
THE COUNCIL OF STATE GOVERNMENTS
121 SECOND STREET 4TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
TELEPHONE (415) 974-6422

RESOLUTION NO. 89-02

PROPOSED BY ATTORNEY GENERAL
ROGER TELLINGHUISEN (SD)

SUPPORTING FEDERAL COURT REVIEW OF THE
INDIAN CIVIL RIGHTS ACT OF 1968

WHEREAS, Indian tribes have a quasi-sovereign status and, as such, they are not bound by constitutional safeguards. *Talton v. Mayes*, 163 U.S. 376 (1896).

WHEREAS, in 1968, the Congress of the United States enacted the Indian Civil Rights Act of 1968 (ICRA) 25 U.S.C. §§ 1301-3, to provide for the American Indian most of the broad constitutional rights afforded to other Americans.

WHEREAS, in 1978, the Supreme Court of the United States in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), held that, except for habeas corpus, the rights guaranteed by ICRA could not be enforced in federal courts.

WHEREAS, in 1988, a bill was introduced to correct this anomaly and provide federal court authority to enforce individual rights under ICRA.

WHEREAS, the Department of the Interior endorsed this bill as "sensitive to tribal sovereignty and prerogatives, while making enforceable the constitutional rights promised by the ICRA," and the Department of Justice concluded that the bill "balances legitimate tribal interests with a meaningful program to protect individual statutory rights."

WHEREAS, on March 6, 1989, this bill was introduced as S. 517.

WHEREAS, on March 15, 1989, at a meeting of the Conference of Western Attorneys General in Washington, D.C., with the Honorable Manuel Lujan, Secretary of Interior and other officials of the Department of Interior, continued federal support for S. 517 was firmly reiterated.

WHEREAS, the Conference of Western Attorneys General is actively involved in studying and evaluating the inter-relationship of federal, state and tribal governments and nearly all aspects of Federal Indian Law.

WHEREAS, support for the concept of federal court review of cases arising under ICRA is important and will help avoid any premature endorsement of other provisions of S. 517.

NOW THEREFORE BE IT RESOLVED that the Conference of Western Attorneys General:

1. Supports the concept of federal court review of cases arising under the Indian Civil Rights Act of 1968 and to this extent, endorses S. 517; and
2. Respectfully requests that hearings on S. 517 be scheduled to allow interested parties the opportunity to express their views.

(RESOLUTION ADOPTED ON AUGUST 3 AT THE 1989 CONFERENCE OF WESTERN ATTORNEYS GENERAL ANNUAL MEETING IN JACKSON, WYOMING.)

APPENDIX C

CONGRESSIONAL RECORD - SENATE

Proceedings of the 101st Cong., 1 Session Vol. 135 Washington, Monday, March 6, 1989, No. 23.

By Mr. HATCH:

S. 517. A bill to provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes; to the Committee on the Judiciary.

INDIAN CIVIL RIGHTS ACT AMENDMENTS

Mr. HATCH. Mr. President, I rise today to introduce the Indian Civil Rights Act Amendments of 1989

TRIBAL GOVERNMENTS AND SOVEREIGNTY

In the 1800's, Congress began establishing Indian reservations on which Indian tribal governments could continue to exercise their sovereign powers. Native Americans, who are members of those tribal governments as well as U.S. and State citizens, are unique among racial minorities. Their actions may be restricted by tribal as well as State and Federal authority.

In that capacity, tribal governments exercise broad criminal and civil jurisdiction over both their members and their territory. They retain all of the powers not specifically denied them and which are consistent with their status as quasi-sovereign governments. While criminal jurisdiction is limited to tribal members, and perhaps

nonmember Indians, tribes exercise broad civil, regulatory, and taxing authority over both Indians and non-Indians who reside within the reservations or who do business with tribal organizations.

While the decisions of these tribal governments reflect the history, culture, religious convictions, and shared values of the tribal leaders and members, the process of tribal government is largely based on a constitutional model. Most tribes, for example, are constitutional in nature and organized pursuant to the Indian Reorganization Act - Wheeler-Howard Act - of 1934. Very few, the Southwest Pueblos are the notable exception, have religious or other traditional forms of Indian governments.

Constitutionally, tribal governments differ from most State and Federal governments. Some of the fundamental checks and balances existing within the Federal and State constitutional framework, for example, are not present at the tribal level. Real power in many tribal governments rests with the tribal council or legislative branch. Tribal councils pass the ordinances, resolutions and other processes which create tribal law. Through standing committees in such areas as social welfare, law enforcement, or the judiciary, tribal councils then perform executive management, and implementation functions as well. The tribal councils often micromanage tribal programs and their function is substantially different from the more general oversight role performed by non-Indian legislative bodies.

Separation of powers into coequal branches of government in order that one may check the potential abuse

of another is not a concept well-established in tribal governments. As a result, tribal governments may lack pluralism, respond more to majority concerns, and ignore minority interests.

In that context, tribal courts exist in only about one-half of the tribal governments. Where courts do exist, they are often a creation of the tribal council and, therefore, subject to and dependent on the council. Rarely do tribal courts exist constitutionally as a separate coequal branch of the tribal government. As a consequence, tribal courts may lack the powers to review tribal council actions, may be otherwise limited jurisdictionally, and may lack independence from the tribal council or tribal chairman.

Tribal governments, because they are neither Federal nor State instruments and because they predate the Constitution, are not restricted by Federal or State constitutional authority. Similarly, tribal governments are not bound by many Federal civil rights statutes including, for example, civil actions for deprivations of statutory or constitutional rights, 42 U.S.C. section 1983, the Voting Rights Act, 42 U.S.C. 1973, and laws prohibiting discrimination in employment, 42 U.S.C. 2000e-1.

THE 1968 INDIAN CIVIL RIGHTS ACT

However, Congress has plenary power over Indian matters. This exceptionally broad congressional authority is found in article I, section 8, clause 3 of the Constitution, which gives Congress the power to "regulate commerce * * * with Indian tribes." In an exercise of its plenary power, the Senate Judiciary Subcommittee on

Civil and Constitutional Rights heard complaints of civil rights violations by tribal governments. The subcommittees held hearings from 1960-1967 and documented widespread civil rights abuses on the part of tribal governments generally.

This record of civil rights abuses by tribes led to the enactment, over objection by tribes, of the Indian Civil Rights Act, as title II of the Civil Rights Act of 1968. The Act applies substantial portions of the Constitution's Bill of Rights and the 14th amendment to tribal government in much the same way that the Federal Bill of Rights restricts the Federal Government. As set out in title II, section 202 of the Indian Civil Rights Act:

No Indian tribe in exercising powers of self-government shall -

(1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) taken any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

In deference to Indian tribal values, however, certain constitutional provisions, including the first amendment's prohibition against establishing religions, were omitted. Other concessions were made to Indian tribal governments and values. Tribes, for example, need not provide indigent criminal defendants with counsel. Much of the concern, and the ultimate concessions, centered on the financial impact of granting broad rights to individuals who come in contact with tribal governments.

EARLY ENFORCEMENT

For 10 years, from 1968 to 1978, the Indian Civil Rights Act was routinely enforced in both tribal and Federal courts. Each Federal appellate court which considered the Indian Civil Rights Act; that is, the Fourth, Eighth, Ninth, and Tenth Circuit Courts, found the act within Congress' power and inferred a private right of action in Federal court to enforce the act's provisions.

The number of reported Federal district court cases between 1968 and 1978 was substantially less than 100 or roughly 10 per year nationwide. One way to read such a statistic is to see the positive impact or value that possible Federal civil rights enforcement has on encouraging tribal compliance with the act. Certainly the tribal exhaustion requirement which Federal courts routinely read into the act tended to resolve many issues at the tribal level without the need for Federal court action.

To be sure, there is little, if any, evidence that between 1968 and 1978 tribal governments suffered substantially as a result of the limited Federal court Indian Civil Rights Act enforcement. For example, there is no evidence that any tribe was forced to terminate its tribal government functions or became insolvent as a result of the act. In fact, there is some evidence that the act had a salutary effect on tribal government by, among other things, checking tribal abuse, providing for a more pluralistic tribal government, and encouraging nonreservation capital investment.

For the most part, pre-1978 Indian Civil Rights Act decisions enforced the act within the context or framework of existing tribal traditions, customs, and values. In

due process cases, for example, Federal courts looked to tribal law or customs for a definition of what process was due. Tribal defense in equal protection litigation often relied on tribal "rational basis"; that is tribal law or custom, not available to non-Indian governments.

TERMINATION OF FEDERAL COURT REVIEW OF INDIAN CIVIL RIGHTS ACT ABUSES

Federal court review came to an end in 1978 with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). There, the Supreme Court said the Indian Civil Rights Act does not provide for a waiver of sovereign immunity and, further, the act fails to provide a private right of action for individuals in Federal court. The court found two distinct and "competing" purposes in the act: First, to protect individuals from tribal abuse of power; and second, to promote Indian self-government. Although the court found that Congress has the power to provide a Federal forum, it said to do so may limit tribal court power and, thereby, lessen or infringe on tribal sovereignty or self-government. Accordingly, the court refused to read in the Indian Civil Rights Act a right of action in Federal court which was not explicitly contained in the act. The court went on to warn the tribes, however, that if they were deficient in applying and enforcing the act, Congress may in the future provide for Federal relief.

CRITICISM OF THE LACK OF FEDERAL COURT REVIEW

Over the last few years, substantial criticism has been raised over the burden often placed on plaintiffs by the

Santa Clara Pueblo decision. While some tribal governments have gone to great lengths to ensure enforcement of the Indian Civil Rights Act guarantees, such is not the case with all tribes. In a 1984 report by the Presidential Commission on Indian Reservation Economies, the commission attacked the fairness of some tribal government proceedings. In its report, the commission states:

[Failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. * * * Both Indians and non-Indians complain of political discrimination against them by tribal governments and tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.]

Similar criticism has also been raised by the Federal courts. In the case of *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), the 8th Circuit Court of Appeals reviewed a case in which the plaintiff claimed that he was wrongfully refused permission to run for tribal office by an action of the tribal council. In addressing the lack of protection for the plaintiff's rights under the Indian Civil Rights Act, the court stated:

We must, however, express serious concern that Shortbull's rights under [Sec.] 1302 of the Indian Civil Rights Act (ICRA) may never be

vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in *Santa Clara Pueblo* that there is no private right of action under the ICRA. Shortbull has no remedy.
* * *

We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate [citations omitted], unless and until Congress provides otherwise. [Citing *Santa Clara Pueblo*.] We question whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians from the arbitrary and unjust actions of tribal governments," and in this case it renders the rights provided by ICRA meaningless.

The Tenth Circuit Court of Appeals also attacked the current enforcement situation in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). In one of the few non-habeas corpus Indian Civil Rights Act cases to provide a federal forum by narrowly construing the Santa Clara Pueblo decision, the court provides some useful insights with reference to the facts and the resulting lack of fairness in that case:

Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and

had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of this type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cooks was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with an SBA loan. The lodge was completed and opened, but the next day the tribes closed the road at the request of a nearby Indian family. . . .

The [tribal Joint Business Council directed that access to the Dry Creek Lodge be prevented by the federal officers, and the [Indian family] were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. Sec. 11.22. The consent was not given. The state court cases were removed to the federal court. In the federal court the defendants urged that there was no remedy - no jurisdiction. * * * The Tribal Business Council according to the minutes, directed that the differences between the [Indian] family and the plaintiffs be settled by self-help, and this was done. The plaintiffs, however, did not respond the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal property rights asserted by plaintiffs be considered. * * *

The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy. The self-help which was suggested to shut down plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

In that case, even the dissenting judge acknowledged that dilemma when he stated:

To me this is a most, disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by [section] 1302 of the Indian Civil Rights Act, under the most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was denied to the tribal court, as the majority opinion points out. * * *

[T]hese damage claims are * * * barred * * * unless and until Congress provides otherwise.

Only recently, this criticism by the Federal courts of the status quo was reaffirmed by the U.S. District Court for the District of Montana in the case of Little Horn State Bank versus Crow Tribal Court. After a lengthy review of the facts in which the plaintiff was repeatedly denied his rights by the defendant, the Judge went on to state:

This Court is well aware of the continued promotion of tribal self-government and self-determination. In *National Farmers Union Ins. Co. v. Crow Tribe* [citation omitted], the Supreme Court directed the federal district court to give tribal legal institutions the "proper respect" by staying its hand in order to allow the Tribal Court a "full opportunity to consider the issues before them." [Citation omitted.] This Court, in keeping with its obligation to uphold the law, will honor that directive.

However, it has become extremely difficult to do so in the face of such decidedly egregious facts as are presented herein. Plaintiff has recognized the sovereignty of the Tribe and has valiantly tried to operate within the Tribal Court system, seeking its approval of a valid judgment entered in the courts of the State of Montana, and assistance in enforcing the same. The Crow Tribal Court, acting as a sort of "kangaroo court" has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA,

depending on the forum. It appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

Let me reiterate that these abuses that are cited by the courts are not necessarily occurring in all or even a majority of the tribal governments. Nevertheless, the situation was serious enough to warrant congressional action in 1988, and it appears that at least with some tribes such is still the case.

THE NEED FOR LEGISLATION

The concerns of the courts that I have been quoting are further supported by an extensive record of the lack of Indian Civil Rights Act enforcement that is currently being compiled by the U.S. Civil Rights Commission. For the last couple of years, the Commission has been holding a series of hearings on this issue. While the Commission's report is not yet complete, the transcripts and hearing records contain many statements that further support the allegations of failure by some tribal governments to adequately enforce the civil rights guaranteed to both tribal and nontribal reservation residents alike.

Because of the enforcement problems that have occurred since the Santa Clara Pueblo case, the time has now come to follow the Supreme Court's dictum and legislate a Federal court remedy. A review of post-Santa Clara Pueblo Federal and tribal case-law, existing Federal

studies, news reports, and other available information, makes clear that rights secured by the Indian Civil Rights Act have been less than fully enforced.

In earlier testimony before the U.S. Civil Rights Commission, the Department of Justice provided some interesting statistics and background with respect to its involvement and monitoring of Indian Civil Rights Act enforcement. I would like to share some of that testimony with my colleagues at this point:

In the 7 years prior to Santa Clara, the Department of Justice received about 230 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18% of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non-ICRA commitments on [the part of the Department]. The Department did, however, participate in 6 federal civil lawsuits which raised ICRA issues, including 2 brought solely on ICRA claims. No cases have been brought subsequent to Santa Clara. Most complaints brought to the Department's attention pre-Santa Clara involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, i.e. police and court irregularities, and housing assignment policies.

Since the Court's 1978 decision in Santa Clara, the Justice Department has received about 45 ICRA complaints alleging violations of the civil rights of Indians by tribal governments. No action has been taken on any complaint and no effort has been made, post Santa Clara, to invoke the jurisdiction of the federal courts.

Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and mal-apportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including non-compliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the Santa Clara facts) to an allegation of unsanitary and inadequate tribal jail conditions.

The following incidents are representative of the more serious complaints received by the Department since Santa Clara and, to our knowledge, which have gone unreviewed by federal courts. On March 13, 1979 a tribal member was arrested for disorderly conduct by tribal officials. An investigation of the circumstances surrounding his arrest, trial and punishment revealed the following information. The victim was held without bail in pretrial confinement for 5 days. On March 18, 1979 he was transported from the jail and taken to a room containing tribal officials. All other persons were removed from the room. The victim was forced to kneel in front of the tribal officials. He was told that he was charged with disorderly conduct and asked several questions concerning his arrest on March 13th. He was never informed of the statutory rights set out in the ICRA. After a time, a tribal official asked that a rawhide whip

about 2 feet long be brought in the room. When it arrived, the official instructed a subordinate to whip the victim four times, which was done. The victim was sentenced to 30 additional days in jail and returned to jail without medical attention. Other information confirms that the victim's account is an accurate description of how trials are conducted at the tribe. Non-public proceedings, no representation by counsel, no notification of procedural rights and whipping are all customary in criminal proceedings.

A Southwest tribe is districted into several separate council districts. Federal courts have held that the due process clause of the ICRA requires that trial council districts comply with one person, one vote requirements. However, the 1982 election districts exceed the maximum permissible derivation by approximately 200-400% depending upon population base used. A recent redistricting has reduced that deviation to approximately 70%.

In a 1982 complaint, an attorney wrote [the Department] alleging that a tribe refused to permit him to represent his client. The attorney alleged that his client was required to present a case in tribal court while the attorney was present "but only as an observer". According to the attorney's account, when he spoke up on behalf of his client, members of the tribal council tried to have him "removed from the courtroom altogether." He concludes his letter with the observation that "[t]he tribal court system is a total mockery of justice at best and more realistically a fraud" on the tribal members. Subsequently the attorney was "removed" from the reservation by tribal law enforcement authorities. In a February 20, 1985 letter, a tribal member wrote to complain that she and others "have been cheated in tribal elections". She also complained

that tribal members are "coerced into compliance thru [sic] fear of losing their jobs and our civil rights have been flagrantly violated." She told [the Department] that she "cannot be identified for fear of job reprisal". Finally, [the Department] received a September 6, 1985 letter from an Indian who requested our "help in protecting [tribal members] from our government". Following the submission of a recall petition, the tribal council went through the signatures systematically "giving people the choice of being suspended from employment or publicly apologizing for signing the Petition". The letter continues with the allegation that the "Council is threatening us * * * All we want is the right to vote and elect our leaders. We understand this is supposed to be a real right, but so far there is no avenue for enforcement.

In a recent letter from the Justice Department to the U.S. Commission on Civil Rights, the Department provides a summary of complaints it has received since the Santa Clara Pueblo decision. Mr. President, I ask unanimous consent that a copy of that letter and the incident summary be included in the Record immediately following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH, Mr. President, while abuse of rights by individual tribal officials has surfaced since Santa Clara Pueblo; for example, allegations that tribal judges fail to insist on proper standards prior to issuing search warrants, structural problems are also present and, arguably, more important.

Examples of structural Indian Civil Rights Act problems include the failure of tribal governments to insist on independent judicial review or an equally effective Indian Civil Rights Act compliance procedure. Some tribal governments fail to create tribal courts or, where they do exist, extend to them the power of judicial review.

For example, recent news reports out of my home State of Utah indicate that last year a tribal judge on the Ute Indian Reservation was dismissed from his position by the reservation Business Committee when the judge found the committee in contempt of court for failure to pay more more than \$500 million in back dividends to new tribal members. While the news articles are not detailed as to all of the specific facts of that case, they do point out that the tribal government has passed a new law prohibiting legal action against the tribe in tribal court. If that is the case, and I believe that it is, then given the Supreme Court ruling in Santa Clara Pueblo that Indian civil rights actions may not be brought in Federal courts, it would appear that at least on the Ute reservation there is no possibility of enforcing the 1968 Indian Civil Rights Act in cases involving the tribal government.

This situation and other complaints regarding lack of enforcement of the Indian Civil Rights Act warrant serious congressional action in the form of hearings. We must determine the scope of the problem and take corrective action in the form of legislation to ensure that individuals will have their civil rights enforced.

Efforts have been made to increase Federal funding and provide effective training programs for tribal systems. However, while appropriate funding and training

levels are important, they will not resolve the Indian Civil Rights Act enforcement problems that do exist. The remedy lies with Federal court enforcement. Federal court enforcement, coupled with a requirement of exhaustion of tribal remedies and limited to equitable relief, will achieve the goal to providing an effective Indian Civil Rights Act compliance program without unnecessarily limiting other legitimate tribal goals.

The bill that I am introducing today does just that. It provides for Federal court review and enforcement after an individual has exhausted his or her tribal remedies. The bill will also prohibit the defense of sovereign immunity in civil rights cases. It is a fair and balanced solution to ensure that all citizens, both Indian and non-Indian, enjoy basic civil rights.

SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1 provides that the act may be cited as the "Indian Civil Rights Act Amendments of 1989."

Section 2 adds a new compliance section of the Indian Civil Rights Act, section 204, following the existing three sections: section 201 [25 U.S.C. 1301], "Definitions"; section 202 [section 1302], "Constitutional rights"; and section 203 [section 1303], "Habeas corpus".

Section 204(a) grants Federal district courts jurisdiction of civil actions alleging a denial of rights enumerated in section 202 of the act. The subsection also prohibits the defense of sovereign immunity in civil actions brought to enforce compliance with section 202.

Subsection 204(b) provides an individual, or the Attorney General, with a right of action in the Federal district courts for declaratory, injunctive or other equitable relief if a tribe fails to comply with the individual's civil rights provided by the act. This subsection requires, as a prerequisite to an aggrieved individual's filing suit, the exhaustion of tribal remedies. The tribal remedies, however, must be timely and reasonable under the circumstances so that an individual is protected from dilatory governmental decisionmaking. The Attorney General is not subject to the exhaustion requirement of this subsection.

Relief is strictly limited by subsection 204(b), whether the plaintiff is an aggrieved individual or the Attorney General, to equitable relief, such as a declaratory judgment, an injunction, or other nonmonetary equitable remedies. The equitable relief may be granted against an Indian tribe, tribal organization, or tribal official.

Subsection 204(c) compels Federal district courts to adopt the findings of fact of tribal courts when such findings have been made, unless the Federal district court makes a determination that one of eight listed irregularities occurred respecting the tribal court's procedures. Only in the event of one of the following irregularities, will the Federal court conduct a de novo review of the case:

(1) "The tribal court was not fully independent from the tribal legislative or executive authority." As used in subsection 204(c)(1), "fully independent from the tribal legislative or executive authority" means a separate and

autonomous tribal judiciary which (as in the case of the federal and state governments) is free from the control of other branches of government. In deciding questions of judicial independence, the language quoted above is meant to apply standards no more rigorous than those applicable to state court judges. For example see American Bar Association, Code of Judicial Conduct, Canon 1 ("A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."). Nothing in this subsection is meant to restrict the appropriate discipline of judges who violate established canons of judicial ethics or published standards of judicial conduct. Evidence of judicial misconduct, such as improper ex-parte communications with counsel for a litigating party, may under appropriate circumstances also serve as the basis for a finding of a lack of judicial independence.

(2) "The tribal court was not authorized to or did not finally determine matters of law and fact." As used in subsection 204(c)(2), "authorized" refers to authorization by tribal constitution, statute, or ordinance.

(3) The tribe or those subject to the Act are allowed to interpose a defense of immunity.

(4) The merits of the factual dispute have not been resolved.

(5) The factfinding procedure employed did not adequately afford a full and fair hearing.

(6) The material facts are not adequately developed.

(7) A full, fair, and adequate hearing was not provided.

(8) The factual findings are not fairly supported by the record.

Subsection 204(d) required the Federal court to accord due deference to the interpretation of the tribal court of tribal laws and customs whenever a question of tribal law is at issue.

Mr. President, the bill that I am introducing today strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self-government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act. It was endorsed by the administration last year and I am reintroducing it in the same form. I would encourage my colleagues to carefully examine this issue and support this effort to protect the rights of all Americans.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 517

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Indian Civil Rights Act Amendments of 1989".

SEC. 2, Title II of the Civil Rights Act of 1963 (Public Law 90-284, 25 U.S.C. 1301 et seq.), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding at the end thereof the following new section:

"CIVIL ACTIONS

"SEC. 204. (a) Compliance With Section 202. Federal district courts shall have jurisdiction of

civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

"(b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

"(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that:

"(1) the tribal court was not fully independent from the tribal legislative or executive authority;

"(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

"(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive or other equitable relief, to interpose a defense of immunity;

"(4) The tribal court failed to resolve the merits of the factual dispute;

"(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

"(6) the tribal court did not adequately develop material facts;

"(7) the tribal court failed to provide a full, fair, and adequate hearing; or

"(8) the factual determinations of the tribal court are not fairly supported by the record, in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

"(d) In any civil actions brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs."

U.S. DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION,
Washington, DC, January 24, 1989.
Re: Allegations of ICRA Violations Post
Santa Clara Pueblo versus Martinez
MR. WILLIAM HOWARD,
General Counsel, U.S. Commission on Civil Rights,
Washington, DC.

DEAR BILL: As requested, I have enclosed a summary of alleged ICRA violations contained in our files. The summary includes only those matters or allegations brought to our attention subsequent to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). I have not included other claims of ICRA violations from sources such as the Indian Law Reporter, litigated federal cases or the available literature. I did, however, include matters reported in the news media and note that certain matters outlined below may also have been made available to the Civil Rights Commission. In addition, because we are no longer engaged in ICRA enforcement activity,

the allegations contained in the summary remain unverified.

The 71 separate complaints listed below allege a total of 98 violations of the ICRA. The complaints name 32 different Indian tribes located in 12 states. Areas with the heaviest complaint activity include tribes located in South Dakota with 25 complaints, Arizona with 15 complaints and Minnesota with 10 complaints. One tribe is the subject of 14 separate complaints, some of which allege more than one ICRA violation, and 3 other tribes are the subject of 10, 7 and 6 complaints respectively. The remaining 28 tribes are named in one or two ICRA complaints.

The 98 alleged ICRA violations may be categorized as follows:

<i>Alleged violations</i>	<i>Number of allegations</i>
1. Tribal court practices.....	28
2. Voting or election complaints.....	25
3. Hiring or employment irregularities	12
4. Tribal council activity generally	5
5. Free press infringements	5
6. Housing assignment policies	4
7. Right to counsel allegations	3
8. Taking of private property without compensation	2
9. Vague criminal statutes	1
10. Child custody procedures	1
11. Jail conditions	1
12. Membership practices	1
13. Cruel and unusual punishment.....	1
14. Improper removal from the reservation.....	1

15. Arrest and search procedures	1
16. Racial discrimination.....	1
Total	98

By year, the 712 complaints of ICRA violations can be broken down as follows:

<i>Year</i>	<i>Number of complaints</i>
1978.....	4
1979.....	6
1980.....	2
1981.....	1
1982.....	4
1983.....	2
1984.....	1
1985.....	6
1986.....	13
1987.....	11
1988.....	21

I hope you find this information useful. If you should have any questions, please call the undersigned on 633-4701.

Sincerely,

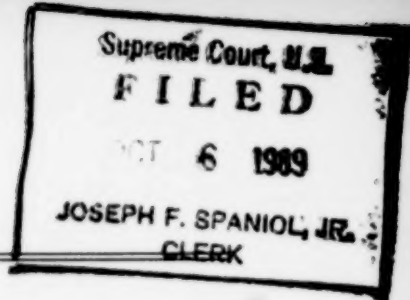
JAMES P. TURNER.
*Acting Assistant Attorney General,
Civil Rights Division.*

JAMES M. SCHERMERHORN,
Special Litigation Counsel

U.S. DEPARTMENT OF JUSTICE-IRCA COMPLAINTS POST SANTA CLARA PUEBLO
VERSUS MARTINEZ

(deleted in printing)

No. 88-6546



In The
Supreme Court of the United States
October Term, 1988

ALBERT DURO,

Petitioner,

vs.

EDWARD REINA, CHIEF OF POLICE, SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SAC AND FOX NATION,
KICKAPOO TRIBE OF OKLAHOMA, and
HOUSING AUTHORITY OF THE SAC & FOX NATION
IN SUPPORT OF RESPONDENTS**

G. WILLIAM RICE
G. WILLIAM RICE, P.C.
1808 South East Avenue
Cushing, Oklahoma 74023
(918) 225-4800

Attorney for Amicus Curiae

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**BRIEF OF AMICUS CURIAE
INTEREST OF AMICUS CURIAE**

The Sac and Fox Nation and Kickapoo Tribe of Oklahoma are federally recognized tribes of Indians located in the State of Oklahoma. Both Tribes have adopted a written Constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967, codified at 25 U.S.C. § 503, and the Sac and Fox Constitution and Charter incorporate the provisions of the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.

Pursuant to their Constitutions, the Legislature of the Sac and Fox Nation and Kickapoo Tribe of Oklahoma have enacted a myriad of ordinances which regulate the conduct of both members and non-members within the Indian Country subject to their jurisdictions. Some of those ordinances include a Business Corporation Act, providing for the incorporation and domestication of corporations within the tribal jurisdiction, a Grievance Committee Procedure Act, providing for the Removal or discipline of elected tribal officers, a Bingo Ordinance, providing for the licensing and regulation of bingo activities within the tribal jurisdiction, a Mineral Leasing Act, regulating the execution, operation, and termination of leases of tribal owned minerals including oil and gas, a Secured Transactions Act, providing for the entry and filing of liens upon personal property held within the tribal jurisdiction when such property is subject to a security interest by a lender, a General Revenue and Taxation Act, providing for the levy, administration, and collection of tribal taxes upon such things as tobacco,

sales of personal property, employees's earnings, possessory interests such as leases in tribal or individual trust lands, the severance of oil and gas from Indian lands, the net receipts of licensed bingo operations, and motor vehicles, and comprehensive police, criminal and appellate procedure, and criminal offenses codes. This Tribal legislation applies to all persons and property located within the Indian country subject to the jurisdiction of the Tribes, and regulates the conduct of both Indians and non-Indians alike. Many of these ordinances are enforced by criminal penalties as to member and non-member Indians alike. The vast majority of the Judges of the Court of these Tribes are attorneys who are Indians, but are members of other Tribes resident in Oklahoma. Written Bureau of Indian Affairs records concerning the adjudication by the Sac and Fox of controversies concerning the Nation or its members and non-members can still be found dating from as early as 1853.

In order for the Sac and Fox Nation and Kickapoo Tribe of Oklahoma to continue their social and economic development within the Tribal jurisdictions it is critical that the Tribal Courts be available to adjudicate criminal violations of tribal law which arise between Indian persons coming within the jurisdiction of the Tribes. Many nonmember Indians are married to members of the Tribes and reside within the Indian Country of the Tribes. Likewise, many nonmember Indians live in housing units provided by the tribes and/or work for the tribes or businesses located within the tribal jurisdictions. Each tribe has many social and cultural events each year which draw from hundreds to thousands of nonmember Indians to the Tribal jurisdiction.

A decision of this Honorable Court determining that Tribal criminal laws could not be enforced against non-member Indians in the Tribal Court would create immediate chaos in the area of law enforcement and tribal government, and change the status quo regarding authority over criminal offenses of non-member Indians all of whom are now tried in the tribal Courts. Such a result could cause the disintegration of the legal foundation for the control of social, cultural, religious, and economic activity within the tribal jurisdiction. In order for Tribal Law to be effective, it must be enforceable in the Tribal forums. Amicus Curiae have an essential and compelling interest in the maintenance of law and order within the jurisdiction of the Tribes, and the regulation by the Tribes of business and personal activities of persons within the jurisdiction of the Tribes in order to provide for and promote the peace, safety, and welfare of all persons who live, work, or otherwise enter into the tribal jurisdiction.

SUMMARY OF ARGUMENT

Indian tribes are distinct political communities which have always exercised criminal jurisdiction over their members and Indians who are members of other tribes as a matter of inherent right. This right has been recognized by treaty, by the courts, and by the United States Attorney General. Congress has never taken this authority from the Tribes, and it is the prerogative of Congress to do so or to leave the status quo intact.

Finally, the Court should resist this invitation to engage in judicial activism, and return to the conservative

approach which is consistent with the historical treatment of Indian tribes. Such an approach requires that the authority of Indian tribes over non-member Indians in criminal cases be affirmed.

ARGUMENT

I. INDIAN TRIBES ARE SOVEREIGN ENTITIES ENTITLED TO EXERCISE THE AUTHORITY TO ADJUDICATE DISPUTES CONCERNING ALL PERSONS AND PROPERTY WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION.

While the term "Indian Country" has been used in many different senses, it has traditionally been defined as country within which Indian tribal laws, whether express legislative enactments or tribal law in the form of traditional usages and customs, i.e., tribal common law, and federal laws relating to Indians are generally applicable to the exclusion of state laws. F. Cohen, *Handbook of Federal Indian Law*, 5 (1942). Felix Cohen, the noted Indian law scholar previously recognized by this Court as the eminent authority in the field, *Squire v. Capoeman* 351 U.S. 1, 8-9 (1956), reviewed the historical development of the term Indian Country, *Id.* at pages 5 and 6:

The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law. Until 1817, it is country within which the criminal laws of the United States are not generally applicable, so that crimes in the Indian Country by whites against whites, or by Indians, are not cognizable in state or federal courts any more than crimes committed on the soil of Canada or Mexico. Treaties defined the boundaries between the

United States, or the separate states, and the territories of the various Indian tribes or nations. Within these territories the Indian tribes or nations had not only full jurisdiction over their own citizens, but the same jurisdiction over citizens of the United States that any other power might lawfully exercise over emigrants from the United States. Treaties between the United States and various tribes commonly stipulated that citizens of the United States within the territory of the Indian nations were subject to the laws of those nations.¹

and further:

Indian country in all these statutes [the original federal legislation defining the Indian country and extending certain aspects of federal law to certain persons or property therein] is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by the statute, and state law is not applicable at all. This conception of the Indian country reflects a

¹ Treaty of January 21, 1785, with Wiandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16; Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18; Treaty of January 3, 1786, with the Choctaw Nation, 7 Stat. 21; Treaty of January 10, 1786, with the Chickasaw Nation, 7 Stat. 24; Treaty of January 31, 1786, with the Shawanoe Nation, 7 Stat. 26; Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawattima, and Sac Nation, 7 Stat. 28; Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of July 2, 1791, with the Cherokee Nation, 7 Stat. 39; Treaty of August 3, 1795, with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wees's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49.

situation which finds its counterpart in international law in the case of newly acquired territories, where the laws of those territories continue in force until repealed or modified by the new sovereign.

It is, therefore, clear that the question of whether an Indian tribe has the authority to enforce its criminal laws against Indian suspects concerning alleged offenses arising within the Indian Country must be determined in light of this historical understanding, and the current federal policy of tribal self-determination and limitation of federal involvement in the affairs of the tribes.

The most basic principle of Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. The statutes of Congress then, must be examined to determine the express limitations placed upon tribal sovereignty rather than to determine its sources or positive content. Cohen, *Handbook of Federal Indian Law*, 122 (1942); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (inherent power to tax, regulate, and exclude non-Indians); *United States v. Wheeler*, 435 U.S. 313, (1978) (power to exercise criminal jurisdiction over Indians); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (membership, and immunity from suit by reason of sovereign immunity); *Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1 (1899) (inheritance); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (power to exclude nonmembers).

Indian tribes, as distinct political communities retaining their original natural rights of self-government, remain a separate people with the power of regulating both their members and other persons or entities within their territory. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Wheeler*, 435 U.S. 313, (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); F. Cohen, *Handbook of Federal Indian Law*, 122-23 (1942).

The outgrowth of this historical and decisional perspective is the repeated determination that Indian tribes have the inherent authority to enforce their own laws in their own forums as to both Indians and non-Indians. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

Within the Indian Country, the repeated litigation in this, and other courts, has clearly shown that Indian Tribes may regulate and adjudicate controversies arising out of the activities of Indians and non-Indians where the conduct of the non-Indian or non-member threatens or has a direct effect on the political integrity, economic security, or the health and welfare of the tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes*, 447 U.S. 134, 153-55 (1980); *Williams v. Lee*, 358 U.S. 217 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Fisher v. District Court*, 424 U.S. 382 (1976); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) appeal dismissed, 203 U.S. 599 (1906); *Maxey v. Wright*, 34 S.W. 807 (Ct. App. Ind.

Terr.) *aff'd*. 105 F. 1003 (8th Cir. 1900); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982) *cert. den.* 459 U.S. 967 (1982); *Knight v. Shoshone and Arapaho Tribes*, 670 F.2d 900 (10th Cir. (1982); *Ortiz-Barraza v. United States*, 412 F.2d 1176, 1179 (9th Cir. 1975); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 963-64 (9th Cir. 1982); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

When considering whether any particular legislation imposes limitations upon the governing authority of Indian Tribes, that legislation or treaty must be liberally construed in the interest of the Tribe, and doubtful expressions resolved in its favor. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1916); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Celestine*, 215 U.S. 278 (1905); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

II. INDIAN TRIBES HAVE FULL AUTHORITY TO ENFORCE THEIR CRIMINAL LAWS AS TO OFFENSES COMMITTED BY INDIANS WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION.

From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of the original tribal sovereignty.

F. Cohen, *Handbook of Federal Indian Law*, p. 122.

Petitioner asserts that Indian tribes do not have the authority to adjudicate in their Courts criminal cases arising within the Indian Country subject to the jurisdiction of the Tribe when the controversy includes as a defendant non-member Indians. Petitioner fails to recognize that when Congress has intended the result Petitioner urges – that the government of an Indian tribe be limited in its authority over persons or property within its territorial jurisdiction – it has explicitly so provided. *See*, Act of June 7, 1897, 30 Stat. 62, 84 (Five Civilized Tribes); Act of June 28, 1906, 34 Stat. 539, 545 (Osage Tribe); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303; Treaty of July 23, 1851, 10 Stat. 949, Article 5 (Proclamation, February 24, 1853) (introduction of liquor into the Indian country); Act of June 28, 1898, Ch. 517, 30 Stat. 495, Sections 1, 3, 26, 28 (Courts and laws affected).

It has been settled law for over a century that the Constitution of the United States does not apply to or limit the authority of Indian tribal governments, *Talton v.*

Mayes, 163 U.S. 376 (1876), and the subsequent case law supporting this black letter law is legion. Felix Cohen, *Handbook of Federal Indian Law*, 122 (1942) stated:

Perhaps the most basic principle of all Indians law, supported by a host decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

The traditional conservative view with respect to the powers of Indian Tribes with respect to the administration of justice within the Indian Country subject to the Tribe's jurisdiction is set out in Cohen, *Handbook of Federal Indian Law* 146 - 149 (1942 Ed.). The authority of a Tribe to punish violations of its law by Indians has been recognized in the decisions of this Court contemporaneous with the enactment of the Indian Major Crimes Act, 18 U.S.C. § 1153, *United States v. Kagama*, 118 U.S. 375 (1886), and by the United States Attorney General. In an 1883 opinion involving a Creek defendant who allegedly killed an Arapaho victim within the Potawatomi Reservation,

the Attorney General concluded that there was no federal jurisdiction over the alleged offense. 17 Op. A.G. 566, 570 (1883). See, also, *State v. McKenney*, 18 Nev. 182, 2 P. 171 (1883), *Anonymous*, 1 Fed. Cas. No. 447 (C.C.D.Mo. 1843).

Within this same time period, it is obvious that Congress knew how to provide for federal and/or state jurisdiction over criminal offenses involving members of two different tribes on the reservation of a third tribe or the reservation of the victim or perpetrator. Section 12 of the Act of May 2, 1890, 26 Stat. 81 (the Oklahoma Organic Act) expressly provided for limited jurisdiction in the courts of the Territory of Oklahoma in cases involving members of different Tribes as follows:

That jurisdiction is hereby conferred upon the district courts in the Territory of Oklahoma over all controversies arising between members of citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma, and any citizen or member of one tribe or nation who may commit any offense or crime in said Territory against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Territory as he would be if both parties were citizens of the United States

Although other sections of that act limited the application of said section to those lands not within the jurisdiction of the Tribes, and said section was no longer of any force after the admission of Oklahoma as a state, it does show that Congress knew how to explicitly reach the result which Petitioner urges in this case. In other words, if Congress determines that nonmember Indians should be subject to either state or federal courts for their offenses

within the Indian Country of another tribe, or if Congress determines that Tribal Courts should no longer have the authority to try nonmember Indians, it knows exactly how to accomplish this result.

In fact, since the early 1800's, Congress has resisted providing for such intrusions into the exercise of tribal governmental authority.² Simply stated, both the Congress and this Court have consistently guarded the authority of Indian tribes over the Indian Country subject to their jurisdiction, and their power to govern persons and property therein. If this authority is to be taken from the tribes, it is for Congress alone to do it. The fact that Congress has not done so requires that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

² See, Rep. Comm. Ind. Aff. 1833 p. 186 (Commissioner Herring); Rep. Comm. Ind. Aff. 1838 p. 424 (Commissioner Crawford); Extract from Report of the Secretary of the Interior, 1865, p. IV in Rep. Comm. Ind. Aff. 1865 (Interior Secretary Harlan); Rep. Comm. Ind. Aff. 1877 pp. 1-2 (Commissioner Hayt); Rep. Comm. Ind. Aff. 1886, p. XXVII (Commissioner Atkins); See, also, Rep. Comm. Ind. Aff. 1889, p. 26 (reporting the establishment of Courts of Indian Offenses in 1882 without the benefit of Congressional approval or authorization, even in light of the many previous requests for such authority), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 68-69 (1978), where this Court discusses another attempt by the Interior Department to obtain Congressional approval to review the governmental actions of Indian tribes - an attempt which was rejected by the Congress. The Indian Reorganization Act itself, 25 U.S.C. §§ 465 et seq., was designed not to limit the authority of traditionally based tribal governments, but to get the Secretary of the Interior out of tribal self-government into which he had

(Continued on following page)

III. THE GRANTING OF AMERICAN CITIZENSHIP TO INDIANS WAS NOT INTENDED BY CONGRESS TO LIMIT THE AUTHORITY OF INDIAN TRIBES WITH RESPECT TO NONMEMBER INDIANS OF OTHER TRIBES.

Prior to the original general Indian citizenship act, Act of June 2, 1924, Ch.233, Public Law No. 175 (H.R. 6355; Approved, June 2, 1924), United States citizenship had been granted only to certain classes of Indians. The question of Indian citizenship was resolved only by individual inquiry in which the facts of each particular case were controlling. In order to be classified as a citizen of the United States, an Indian person born within the United States was required to show that he or she was a citizen by virtue of either (1) treaty provisions allowing "naturalization" such as Articles 13, 17, and 28 of the treaty of February 23, 1867 with various bands or tribes of Indians (15 Stat. 513); (2) receipt of an allotment of land pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388, prior to its 1906 amendment; (3) receipt of a patent in fee simple to an allotment after 1906 pursuant to the Act of May 8, 1906, 34 Stat. 182, amending the General Allotment Act; (4) abandoning his tribe and taking up the habits of "civilized" life pursuant to Section 6 of the General Allotment Act of 1887; (5) being a honorably discharged veteran of World War I pursuant to the

(Continued from previous page)

intruded by his unwarranted assumption of administrative powers. Ziontiz, *After Martinez: Civil Rights Under Tribal Government*, 12 Univ. Calif. Davis L. Rev. 1, 31-33 (1979); Senate Comm. on Indian Affairs, Report No. 1080, 73rd Cong., 2nd Sess., 3-4 (1934); Hearings on S. 2755 and S. 3645, Senate Comm. on Indian Affairs, 73rd Cong., 2nd Sess., p. 2, p. 256 (1934); H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., p. 8 (1934); *Morton v. Mancari*, 417 U.S. 535 (1974).

Act of November 6, 1919; (6) being an Indian woman married to a citizen of the United States after the Act of August 9, 1888, 25 Stat. 392; (7) being subject to special legislation such as the Act of March 3, 1901, 31 Stat. 1447, (extending citizenship to Indians in the Indian Territory) or the Act of March 3, 1921, 41 Stat. 1249-1250, (extending citizenship to Indians of the Osage Tribe in Oklahoma); or (8) being born to Indian parents who were citizens.

In House Report No. 222 to accompany H.R. 6355, 68th Congress, 1st. Session, (the precursor to 8 U.S.C. § 1401(a) (2)) the House Committee stated:

At the present time it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent in fee simple, or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation will bridge the present gap and provide means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of his residence, and your committee has unanimously recommended the enactment of this measure.

In its original form, this bill provided a process by which the Secretary of the Interior in his discretion issued a "certificate of citizenship" to noncitizen Indians born within the United States upon application. The Senate amended the bill to its final form, Senate Report No. 441, 68th Congress, 1st Sess., April 21, 1924 stating that "as [the Five Civilized Tribes and] a large number of other Indians had become citizens under various acts of Congress, it was only just and fair that all Indians be declared citizens."

The intended limited effect of this legislation, however, is shown by the remarks of Mr. Snyder, the sponsor of the bill in response to a question as to whether the bill would affect an Indian's right to vote in state elections:

[I]t is not the intention of this law to have any effect upon the suffrage qualifications in any State. In other words, in the State of New Mexico, my understanding is that in order to vote a person must be a taxpayer, and it is in no way intended to affect any Indian in that country who would be unable to vote unless qualified under the State suffrage act. That is the understanding. And also it goes to this extent, it does not in any way change the right of the Indian to any tribal relation or any property he now holds. It does not affect that in any way but simply makes him an American citizen. . . .

1924 Cong. Rec. - House 9303, May 23, 1924, Remarks of Mr. Snyder. In other words, the grant of citizenship to all Indians, whether they requested it or not, did not grant Indians even the right to vote in state elections, and certainly was not intended to affect their relations with *any tribe*. To the contrary, the grant of citizenship was intended to make Indians American citizens without affecting "any tribal relation" and without requiring the Indian to take "up his residence apart from *any tribe* of Indians." There is simply no indication in the legislative history the grant of citizenship is intended to prevent the exercise of tribal criminal jurisdiction over Indian citizens of the United States simply because they are not a member of the Tribe within whose jurisdiction they allegedly committed an offense. Further, any tribal member may resign his legal and political status as an Indian simply by resigning his membership in an Indian tribe - thereby

becoming for all intents and purposes a non-Indian. Since petitioner did not do so, the judgment of the Ninth Circuit should be affirmed.

IV. THE COURT SHOULD RETURN TO THE CONCEPTUAL CLARITY OF JUSTICE MARSHALL'S DECISION IN *WORCESTER v. GEORGIA*.

In the early 1950's, Congress experimented with a policy of termination of the governmental relationship between the United States and the various Indian tribes through a series of termination acts, and a concurrent resolution expressing the desire of Congress to terminate the federal relationship with Indian people and subject them and their lands to state law. House Concurrent Resolution 108, 83rd Cong., 2d Sess. 2-4 (1954), since repealed. A major step toward implementation of the termination policy was the enactment of Public Law 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588 (Section 7 Repealed and reenacted as amended 25 U.S.C. §§ 1321-1326, 18 U.S.C. § 1162, 28 U.S.C. § 1360. [For a general discussion of these matters, see, Cohen's *Handbook of Federal Indian Law* (1982 ed.) 170-177.]

At the time of the propoundment of this policy, this Court began the drift away from its traditional conservative reliance upon the inherent sovereignty of Indian tribes as the basis for precluding state action and affirming tribal authority over all persons within the Indian Country subject to tribal jurisdiction. This drift began in *Williams v. Lee*, 358 U.S. 217 (1959), wherein the Court propounded the "infringement test" stating "Essentially, absent governing Acts of Congress, the question has

always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." This drift escalated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) wherein the Court acknowledged that it had in some ways departed from the conceptual clarity of Justice Marshall's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and reached its zenith in *Montana v. United States*, 450 U.S. 544 (1981) and *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___, 109 S.Ct. 1698 (1989). In short, a recent line of dicta in cases such as *Williams*, *McClanahan*, and *United States v. Wheeler* have ripened into a limited line of holdings restricting tribal authority and expanding state authority over non-Indians in Indian Country, without benefit of federal statutory sanction, as outgrowths of the since repealed liberal termination policy of the 1950's. This judicial activism has resulted in a quagmire of "balancing tests" and "flexible rules" which appear to be in line with neither traditional Supreme Court holdings, general federal statutes, the Constitution, nor the current policies of the Congress or the Executive branch of the Federal Government. See, "State Power Over Indian Reservations: A Critical Comment On Burger Court Doctrine," 26 South Dakota Law Review 434 (Summer 1981).

Simply stated, these recent decisions each have one element in common. They each tend to limit traditional conservative notions of the sovereign powers of Indian tribal government in favor of increased governmental authority by the states without benefit of Congressional sanction, and in direct conflict with the federal statutes

providing for the extension of state jurisdiction to persons and property within the Indian Country. This liberal attempt to redefine, after two hundred years, the relationship between the three active competitors for authority – the federal, tribal, and state governments – has resulted in a flood of unnecessary litigation and a series of attacks upon the very foundation of tribal governments recognized by the political departments of the United States since the founding days of the Republic.

Aside from the problems incurred in attempting to square these decisions with two hundred years of case law, the intent of the framers of the Constitution, and traditional notions of Indian sovereignty, these decisions ignore the effect of several federal statutes of general application which preempt state authority within Indian Country leaving such authority to be exercised by the Tribe, and the current policies of Congress. When the seminal case leading to this line of decisions, *Williams v. Lee*, was decided, the "infringement test" was completely unnecessary, state action being preempted by federal treaty, Navajo Treaty of 1868, 15 Stat. 667, and Statute, 28 U.S.C. § 1360, 18 U.S.C. § 1151. See, *Kennerly v. District Court*, 400 U.S. 424 (1971).

Congress in 18 U.S.C. § 1151 determined that Indian Country – the area within which tribal and federal law operated to the exclusion of the States – would include all Indian reservations notwithstanding the issuance of any patent, all Indian allotments, and dependant Indian communities. All tracts within Indian Reservations, whether patented to an Indian or a non-Indian, are declared by

Congress to remain Indian Country, and subject to exclusive tribal and federal jurisdiction until Congress otherwise determines. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *United States v. Celestine*, 215 U.S. 278 (1909). —

Under its Commerce Clause authority, Congress has amended Public Law 83-280 at 18 U.S.C. § 1162 to read in pertinent part as follows:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: . . .

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

and further, at 25 U.S.C. § 1321:

(a) The consent of the United States if hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any

such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

These statutes obviate the need for the "infringement test" or "balancing test" analysis in that they are governing acts of Congress specifically specifying the methods by which state law can be made applicable to criminal cases committed by or against Indians within the Indian Country within the boundaries of that State, and in the absence of compliance therewith state law is generally preempted. *McClanahan, supra, Kennerly v. District Court*, 440 U.S. 423 (1971). This case involves an Indian, Congress had determined the extent to which State instead of tribal authority will prevail within the Indian Country – including fee patented lands – in such a fashion that when an Indian is one of the parties in the case it is a matter for the application of tribal law to the exclusion of the state absent compliance with 18 U.S.C. § 1162 and 25 U.S.C. § 1321. When Congress has made such a determination, Courts are not free to review state or tribal action under the dormant Commerce Clause. Courts are final arbiters only when Congress has not acted. Here Congress has struck the balance it deems appropriate, and the Court should continue to allow the Tribe to exercise full authority over all Indians in the Indian Country and criminal offenses therein until and unless the State and the Tribe comply with the statutory formula for the transfer of jurisdiction.

Finally, both the Congress and the executive branch have repudiated the termination theory upon which this line of decisions is founded, and have returned to the

traditional conservative notions of tribal sovereignty and independence from state involvement within the Indian Country subject to the tribe's jurisdiction. *See, Indian Self Determination Act*, 25 U.S.C. §§ 450 et seq.; 1968 *Indian Civil Rights Act*, 25 U.S.C. §§ 1322, 1326 (requiring tribal consent prior to any state assuming civil jurisdiction over that tribe's Indian Country); *Indian Child Welfare Act of 1978*, 25 U.S.C. §§ 1901 et seq. (providing for exclusive tribal authority over Indian child custody actions when the Indian child is a resident or domiciled within the Indian Country and the removal of such actions from state to tribal courts whether or not either of the parents are non-Indian when the child is not within the Indian Country); 25 U.S.C. §§ 2101 et seq. (providing for increased tribal control of mineral development); 25 U.S.C. §§ 2201 et seq. (providing for consolidation of fractionated heirship land in the Tribes); 25 U.S.C. §§ 711 et seq., 712 et seq., 761 et seq., 861 et seq., 903 et seq., (reinstating Tribes terminated pursuant to the termination policy of Congress in the early 1950's – the policy which underlies *Montana, Oliphant*, and the dicta in the other decisions cited above); and 26 U.S.C. §§ 7871 (treating Indian Tribes as States for the purpose of taxation).

It is clearly the will of Congress and the Executive Branch *see, President Reagan's Indian Policy Statement*, that Indian Tribes exercise a broad range of authority over all persons and property within the Indian Country jurisdiction of the Tribe. The court should not violate the will of Congress in such matters, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), should not strain to implement a policy which Congress has rejected,

Bryan v. Itasca County, 426 U.S. 373, 388 (1976), and should return to the conceptual clarity of Justice Marshall by determining that, in regard to tribal authority, "What is not expressly limited [by specific Act of Congress] remains within the domain of tribal sovereignty." Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.).

CONCLUSION

There is no doubt in this case that the general authority of Indian Tribes include the authority to adjudicate criminal cases arising within the Indian Country subject to their jurisdiction when an Indian is the defendant. For these reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1989

ALBERT DURO

v.

Petitioner,

EDWARD REINA

Chief of Police, Salt River Dept. of Public Safety, Salt River
Pima-Maricopa Indian Community; and the
Hon. RĒLMAN R. MANUEL, Sr., Chief Judge of the Salt River
Pima-Maricopa Indian Community Court,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND
BRIEF AMICI CURIAE OF THE ROSEBUD SIOUX TRIBE,
THE UPPER SKAGIT INDIAN TRIBE, THE NORTHERN
ARAPAHOE TRIBE OF THE WIND RIVER RESERVATION,
THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK
RESERVATION, THE COLORADO RIVER INDIAN TRIBES,
THE CONFEDERATED TRIBES OF THE COLVILLE RESER-
VATION, THE CONFEDERATED TRIBES OF THE WARM
SPRINGS RESERVATION, THE GRAND TRAVERSE BAND
OF OTTAWA & CHIPPEWA INDIANS, THE LUMMI TRIBE,
THE QUINULT INDIAN NATION, THE SAULT STE.
MARIE TRIBE OF CHIPPEWA INDIANS, THE SHOSHONE
TRIBE OF THE WIND RIVER RESERVATION, THE TULALIP
TRIBES, THE WINNEBAGO TRIBE OF NEBRASKA AND
THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS IN
SUPPORT OF RESPONDENTS**

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No. 88-6546

In The
Supreme Court of the United States
October Term, 1989

ALBERT DURO

v.

Petitioner,

EDWARD REINA

Chief of Police, Salt River Dept. of Public Safety, Salt
River Pima-Maricopa Indian Community; and the Hon.
RELMAN R. MANUEL, Sr., Chief Judge of the Salt River
Pima-Maricopa Indian Community Court,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
OF THE ROSEBUD SIOUX TRIBE, ET AL.

Pursuant to rule 36.3, *amici curiae*, consisting of four-
teen federally recognized Indian tribes and the Associa-
tion on American Indian Affairs, respectfully move this
Court for leave to file the attached brief *amici curiae* in
support of the Respondent Edward Reina in the above-
captioned case. Respondent consents, but Petitioner
Albert Duro has not responded to the written and oral

requests for permission to file the brief of *amici* and, therefore, this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by this case. If this Court denies tribal governments criminal jurisdiction over Indians within their communities, it will seriously handicap their ability to maintain law and order within their reservations. The interest of the *amici* is described more fully in their proposed brief attached to this motion.

Amici submit the attached brief to inform the Court of the substantial effects this Court's decision will have and of the various tribes' interest in maintaining jurisdiction over Indians who are present within their territory and over Indians who are members of their communities.

Dated: October 6, 1989

Respectfully submitted,

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QUESTION PRESENTED

Whether federal authority has implicitly divested Indian tribes of power to punish criminal acts committed by Indians who reside on the tribes' reservations as part of their Indian communities but who are formally enrolled in other tribes.

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No. 88-6546

In The

Supreme Court of the United States

October Term, 1989

ALBERT DURO

v.

Petitioner,

EDWARD REINA

Chief of Police, Salt River Dept. of Public Safety, Salt River
Pima-Maricopa Indian Community; and the
Hon. RELMAN R. MANUEL, Sr., Chief Judge of the Salt River
Pima-Maricopa Indian Community Court,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE ROSEBUD SIOUX TRIBE,
THE UPPER SKAGIT INDIAN TRIBE, THE NORTHERN
ARAPAHOE TRIBE OF THE WIND RIVER RESERVATION,
THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK
RESERVATION, THE COLORADO RIVER INDIAN TRIBES,
THE CONFEDERATED TRIBES OF THE COLVILLE RESER-
VATION, THE CONFEDERATED TRIBES OF THE WARM
SPRINGS RESERVATION, THE GRAND TRAVERSE BAND
OF OTTAWA & CHIPPEWA INDIANS, THE LUMMI TRIBE,
THE QUINULT INDIAN NATION, THE SAULT STE.
MARIE TRIBE OF CHIPPEWA INDIANS, THE SHOSHONE
TRIBE OF THE WIND RIVER RESERVATION, THE
TULALIP TRIBES, THE WINNEBAGO TRIBE OF
NEBRASKA AND THE ASSOCIATION ON AMERICAN
INDIAN AFFAIRS IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI

Amici tribes are fourteen federally recognized tribes with significant numbers of Indians enrolled in other tribes living on their reservations who are well integrated into the tribal community. *Amicus* Association on American Indian Affairs is a national organization that supports Indian rights. Each tribe asserts the authority to exercise criminal jurisdiction over all Indians within its reservation. A decision by this Court foreclosing tribal jurisdiction over Indians present on their reservations, but enrolled elsewhere, will upset long-standing practice and seriously impair law and order on their reservations. *Amici* urge this Court to uphold tribal authority to exercise criminal jurisdiction over Indians, like Albert Duro, who maintain relations with the tribal community. Specific facts pertaining to each of the *amici* tribes are incorporated in the arguments in this brief.

STATEMENT OF FACTS

On June 18, 1984, Albert Duro was charged in the Salt River tribal court with unlawful discharge of a firearm while residing on the Salt River Pima-Maricopa Indian Reservation in Arizona. The complaint alleged that one of two shots discharged fatally wounded Phillip Brown, an enrolled member of the Gila River Pima-Maricopa Indian Community. A federal indictment for murder was returned, but the United States Attorney dismissed the case without prejudice and transferred the custody of Duro to the Salt River Tribe. At the time of the shooting, Duro, an enrolled member of the Torrez-Martinez Band of Mission Indians of California, was maintaining tribal relations with the Salt River Tribal Community – he had lived for several months on the Salt River Reservation with his girlfriend, an enrolled member of the Salt River Tribe, and was working for a tribally-owned construction company. He had previously submitted to the Salt River

tribal court's jurisdiction for an offense unrelated to this case.

SUMMARY OF ARGUMENT

The federal government's treatment of criminal offenses among Indians supports the proposition that Indian tribes retain criminal jurisdiction over all Indians present within their territory. However, this Court need not reach the issue as to *all* Indians since the defendant Duro is indisputably an Indian who was voluntarily maintaining tribal relations with the Salt River Tribe at the time of the alleged offense. He was residing on the Salt River Tribe's reservation with a tribal member and was employed in a tribally owned and operated construction company. In short, he was plainly a voluntary member of the tribal community and, as such, clearly within the class of Indians the federal government assumed would remain under tribal jurisdiction.

ARGUMENT

Upon formation of the United States, Indian tribes were acknowledged "as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832). As this Court stated in *United States v. Wheeler*, 435 U.S. 313 (1978), the powers of Indian tribes are of an inherent nature and prior "to the coming of the Europeans, the tribes were self-governing political communities." 435 U.S. at 322. As "nations" or "sovereign political communities," they had criminal jurisdiction over Indians of other tribes who resided or were present within their territory. Such authority, while not necessarily manifested in formal "criminal" laws, was enforced through informal sanctions and restitution. See F. Cohen, *Handbook of Federal Indian Law* 335 (1982). As Felix Cohen observed: "An Indian reservation would be a criminal's paradise were it not for the preventive and punitive

measures of the tribe itself." F. Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 145, 155 (1940).

Once a tribe is acknowledged as possessing a particular attribute of self-government, the inquiry shifts to a review of federal law to determine whether these inherent powers have been limited by specific restrictions in treaties or statutes, or are in "conflict with the interests of [the United States'] overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). This Court described the approach for determining the extent of tribal criminal jurisdiction as based

principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Id. at 206, quoting *DeCoteau v. District County Court*, 420 U.S. 425, 444-445 (1975).

In *Oliphant*, "the common notion[] of the day" informing the Court's analysis was that the exercise of tribal criminal jurisdiction over *non-Indians* was, from the outset of the Union, inconsistent with the tribes' dependent status. This notion was revealed upon review of the history of federal-tribal relations gleaned from treaties, Executive Branch action and statutes. Not at issue in *Oliphant*, or in any other Supreme Court case, was the question of tribal authority over Indians not "enrolled" as members in the governing tribe, but who were present in, or part of, a tribal community. A review of the factors considered in *Oliphant* reveals that tribes historically exercised jurisdiction over intra-Indian offenses and that the federal government has not divested such authority.

I. HISTORICAL AND MODERN RESERVATION CIRCUMSTANCES REVEAL EXTENSIVE INTER-TRIBAL INTEGRATION AND THE CONTINUOUS EXERCISE OF CRIMINAL JURISDICTION OVER INDIANS ENROLLED ELSEWHERE.

A. Historically, Tribal Communities Included Indians From Other Tribes Who were Subject to the Criminal Jurisdiction of the Host Tribe.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97 (1978), this Court found an absence of any historical assertion of tribal criminal jurisdiction over non-Indians. While the historical evidence regarding tribal jurisdiction over Indians not enrolled in the governing tribe does not speak of legal terms such as "criminal jurisdiction," the picture painted by historians and anthropologists establishes that tribes exercised what we now call "criminal jurisdiction" over all Indians present within their territory. It was against this historical backdrop that statutes dealing with criminal jurisdiction were passed and treaties negotiated. The backdrop is in stark contrast to that which informed this Court's analysis in *Oliphant* with respect to tribal jurisdiction over non-Indians. Indeed, the mixing and visiting among neighboring Indian tribes continues to this day and the common-sense assumption that the host tribe's laws will be followed continues to be valid.

Historically, Indian villages consisted of amalgamations of Indians from various tribes.

Although every Indian town carried an identifying tribal name, the resident population included people connected with other tribes. . . . [There were] significant minorities in villages of other tribes, the mixed villages notable along the border between neighboring tribes, and multitribal communities that developed during wartime dislocations.

Atlas of Great Lakes Indian History at 4 (1987). For example, in the 18th century, Potawatomi villages contained large

numbers of Ottawa and Ojibwa, and frequently smaller numbers of Sauk and Mesquakie. *Id.* at 63-64. Just prior to the Indian War of 1791-94, the Delaware and Shawnee joined the Miami in their towns at the head of the Maumee River. *Id.* at 87. This pattern of mixing continued in the early 1800's. *Id.* In Michigan's Lower Peninsula in 1830, "[t]ribal populations became increasingly mixed. . . . Members of all three tribes [Ojibwa, Potawatomi and Ottawa] were found on the upper Thornapple River. . . ." *Id.* at 133. The intertribal mixing common to the Great Lakes Region was common in other areas as well.

Historical research shows that while tribes generally occupied discrete territories, to some extent the same areas may have been used jointly and permissively by other tribes. Indian tribes are not, and never have been, uniform, static, homogeneous political groups. *See id.* at 60. Numerous factors led to members of one tribe living with or having significant relations with another tribe. Refuge from enemies was one reason. Marriage between individuals of different tribes was probably the single most common reason for changes in tribal makeup. Marriage outside the tribe was extensive among the Coast Salish groups of the Pacific Northwest Coast. Elmendorf, *Coast Salish Status Ranking and Intergroup Ties*, 27 *Southwestern Journal of Anthropology* 360 (1971). Another anthropologist who studied the Coast Salish explained that, "[t]he community was linked through ties of marriage and kinship with other communities and these with still others to form a social network with no very clear boundaries." Suttles, *Affinal Ties, Subsistence, and Prestige Among the Coast Salish*, 62 *American Anthropologist* 296 (1960). Many Northwest tribes, such as the Upper Skagit, had restrictions on the marriage of close relatives and placed a positive value on marriage with a member of another village. Collins, *Valley of the Spirits: The Upper Skagit Indians of Western Washington* 96 (1974). This was

the pattern for the Nooksack, Stillaguamish, Snohomish, Upper Snoqualmie, Swinomish, and Samish villages as well. *Id.* at 98.

Members of neighboring tribes would sometimes come to live with other tribes and participate in aspects of tribal life. For example, in *The Cheyenne Way*, a detailed study of tribal law, the punishment of two sons of a Dakota hunter who had been living with the Cheyennes is recounted. As would be expected, when the youths broke the Cheyenne law of the hunt, they were punished. The Dakota father acquiesced in the Cheyenne action and told his sons: "Now you have done wrong. You failed to obey the law of this tribe." Llewellyn and Hoebel, *The Cheyenne Way* 112 (1941).

Tribal laws were usually not written but were highly formalized and based on customs and usages. The few written histories of tribal laws reveal that Indians from other tribes were bound and protected by the criminal laws of the tribe. The "Cheyenne Law of Killing," as summarized from recorded cases and opinions in *The Cheyenne Way*, provided that the murder of a Cheyenne would result in banishment from the tribe. A "Cheyenne" was defined to include "a resident alien [or captive?] substantially identified with the Cheyennes and notably deserving of the people." *Id.* at 166 (brackets in original).

Thus, historically, tribes exercised criminal jurisdiction over Indians from other tribes who had become part of the tribal community.

B. Federal Policies Underlying the Establishment of Reservations Resulted in the Creation of Intertribal Reservation Communities with Extensive Cultural and Kinship Ties to Other Reservation Communities.

Reservations were set aside as homelands for Indian tribes, at first by treaty and later by executive order. When the federal government began confining tribes to reservations, it did not follow any consistent policy. Many

reservations are home to confederations of several historically related tribes, e.g., Confederated Tribes of the Warm Springs Reservation, Tulalip Tribes of Washington, Colville Confederated Tribes¹, while larger tribes were sometimes broken into several smaller groups and placed on separate reservations. For example, the Sioux Nation, consisting of many bands, originally was placed on the Great Sioux Reservation encompassing the western half of South Dakota and extending slightly into North Dakota and Nebraska. Treaty with the Sioux, Art. 2, 15 Stat. 635 (1868). An 1889 agreement divided the Sioux Reservation into six smaller reservations: Lower Brule, Crow Creek, Cheyenne River, Pine Ridge, Rosebud, and Standing Rock. Ch. 405, § 12, Act of Mar. 2 1889, 25 Stat. 888. As of 1980, significant numbers of Sioux were residing on Sioux reservations other than their own. Bureau of the Census, 1980 Census of Population, "American

¹ Many treaties provided for the later admission to reservations of other tribes by permission of the resident tribe. For example, typical language provided that the reservation be set aside "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Treaty with the Sioux, Art. 2, 15 Stat. 635, 636 (1868). Later, tribes were placed together on the same reservation for the convenience of the federal government. The Shoshone and Arapaho Tribes, for example, were forced to share the Wind River Reservation in spite of the explicit statement in the treaty with the Shoshone Indians that the reservation would be "set aside for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and the United States now solemnly agrees that no persons . . . shall ever be permitted to pass over, settle upon, or reside in" that territory. Treaty with the Eastern Band Shoshoni and Bannock, Art. 2, 15 Stat. 673 (1868); see *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

Indians, Eskimos, and Aleuts on Identified Reservations and in the Historic Areas Of Oklahoma (Excluding Urbanized Areas)," Vol. 2, Table 4 (1986) (hereinafter 1980 Census). Historically, these Sioux bands shared the same social, religious and political institutions. They still do. It would defy logic and common sense to preclude the exercise of criminal jurisdiction by one modern Sioux tribe over the members of another while present on each other's reservations.

Thus, many present-day reservations are home to tribes that descended from numerous historically semi-autonomous bands or groups, or to confederations of tribes interrelated by extensive kinship ties. These patterns of kinship and shared cultures continue to the present, resulting in large numbers of Indians living on or visiting reservations where they are not enrolled. For example, the Confederated Tribes of the Warm Springs Reservation includes descendants of seven bands of Sahaptin and Wasco-speaking Indians who lived along the Columbia River and its tributaries.² Many Northwest tribes, such as the Lummi, Quinault and Upper Skagit, are descended from several ancestral groups. Members of these amalgamated tribes have strong ties to other tribes which frequently share the same ancestry.

This pattern holds true in other regions as well. For example, the Sault Ste. Marie Chippewa Tribe and Grand

² These bands were closely related by language, culture and religion with yet other Sahaptin and Wasco-speaking Indians to the north who later became part of the Yakima Indian Nation, and to the east who became part of the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe of Idaho. Also settled at Warm Springs is a group of Paiute Indians who are closely related to northern Paiutes on the Burns Paiute Reservation in Oregon, the Fort McDermott Paiute-Shoshone Reservation on the Oregon/Nevada border and other Paiute reservations and colonies throughout Nevada, northern California and southern Idaho.

Traverse Band of Ottawa and Chippewa Indians in Michigan include descendants of several ancestral bands. Historically, the Ottawa and Chippewa were small groups that gathered in larger bands seasonally for certain purposes such as spring maple sugaring and summer fishing encampments along the Great Lakes. See *Atlas of Great Lakes Indian History* 5 (1987). The amalgamation of these tribes occurred gradually and naturally, based in part on common cultural traditions, living in close proximity, and the tendency of the federal government to define them as a single unit. The result has been, in the Great Lakes Region as in the Pacific Northwest, that Indians are often eligible for enrollment in more than one tribe. For example, virtually all of the members of the Bay Mills Indian Community, a federally recognized tribe in Michigan, are eligible to enroll in the Sault Tribe. The Colville Confederated Tribes regularly processes applications for enrollment for Indians previously enrolled elsewhere, and applications for relinquishment of enrollment for Indians who wish to enroll in another tribe.

Because of historical ties and federal policies, intermarriage between members of different tribes is common.³ These intermarried couples may have children who may be enrolled in the local tribe or may be enrolled in another tribe. The result is that many, if not most, of the Indians living on reservations not their own are related to enrolled tribal members by blood or marriage. For example, over 1000 current enrolled members living at Fort Peck each has a parent who is enrolled in another tribe.

³ On the Colorado River Reservation, 23% of the Indians enrolled elsewhere are married to enrolled members. On the Colville Reservation, 25% of the Indians enrolled elsewhere have become part of a Colville family through marriage or adoption. On the Warm Springs Reservation, approximately 370 of the 500 Indians enrolled elsewhere (more than 70%) are married to enrolled members.

C. Implementation of the Trust Responsibility Has also Encouraged Intertribal Reservation Communities.

Implementation of the federal trust responsibility has fostered extensive tribal integration and has made the exercise of criminal jurisdiction over all Indians who are part of the tribal community even more critical. For example, Indian preference in hiring, required by federal law, has encouraged Indians to work for tribes other than their own. The Indian Reorganization Act (IRA) of 1934, accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA). 25 U.S.C. § 472.⁴ The preference requirement applies to the Indian Health Service (IHS), see *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984), and to all federal programs administered by tribes under self-determination contracts. Indian Education and Self-Determination Act of 1975, 25 U.S.C. § 450e. The result of the employment preference has been the "presence on most Indian reservations of Indians who are not members of the local tribe." *Miller v. Crow Creek*, 12 Ind. L. Rep. 6008, 6009 (Intertribal Ct. App. 1984).

Federal services, administered for the most part on reservations by the BIA, IHS or through a self-determination contract with a tribe, are available to *all federally recognized Indians* on any federal reservation. These services encourage large numbers of Indians enrolled in other tribes to move to or visit reservations not their own. This creates added burdens for the tribes in the administration and provision of the full range of governmental services – not the least of which is police protection. For example, 1,136 members of other federally recognized tribes living on or near the Tulalip Reservation depend on the Tulalip tribal government to provide medical, housing, and other assistance

⁴ Indian preference has been upheld against a challenge that such a preference constitutes racial discrimination. *Morton v. Mancari*, 417 U.S. 535 (1974).

pursuant to federal Indian programs. On the Colville Reservation, the Indian Health Service Clinic recorded 5,502 visits by enrolled Colville tribal members and 2,231 visits by Indians enrolled elsewhere during one year.

The federal allotment policy, combined with extensive intertribal marriage and inheritance by successive generations, has resulted in substantial property holdings on reservations by Indians who are members of other tribes. Cf. *Hodel v. Irving*, 481 U.S. 704 (1987). A 1958 study by the BIA revealed that 73% of the 350,000 allottees studied owned an interest in an allotment on a reservation governed by a tribe other than their own. Hearing on H. J. Res. 158, before the Senate Select Committee on Indian Affairs, 98th Cong. 2d. Sess. 9 (1984).⁵ As beneficial owners of reservation trust lands, Indians who are enrolled in other tribes have significant interest and involvement in activities on the reservation and are similarly situated to the enrolled members who have interests in reservation trust lands.

D. Present Reservation Circumstances Necessitate the Exercise of Tribal Criminal Jurisdiction Over All who are Part of the Tribal Community.

1. Under modern tribal policies, Indians not enrolled in the local tribe participate as members in tribal social, cultural and political activities.

The most recent federal census demonstrates the large numbers of Indians who reside on the various reservations, but are enrolled elsewhere. 1980 Census, Table 4, *supra*. On average, thirteen percent (13%) of the resident

⁵ For example, over 4,500 Indians enrolled elsewhere own interests in Indian trust lands within the Colville Reservation. Approximately 116 Indians enrolled elsewhere own interests in trust allotments on the Warm Springs Reservation. On the Quinault Reservation, allotments of surplus lands were made to members of other Washington coastal tribes.

Indian population are not enrolled in the local tribe(s).⁶ Indians enrolled in other tribes usually receive tribal services and participate in the tribal community on the same basis as enrolled members. For example, the Tulalip Tribes' nutrition program is available to Indians of other tribes who have lived on the reservation a substantial period of time. At Fort Peck, all Indians are eligible to receive assistance from the tribal housing program and 170 tribal housing units are occupied by Indians enrolled elsewhere. Tribal schools and tribal colleges are open to all Indians.

Many tribes give employment preference to enrolled members and Indians enrolled elsewhere over non-Indians.⁷ For example, the Tulalip Tribes, requires all employers on the reservation to give preference to members of any federally recognized tribe in hiring, promotion, training, contracting and subcontracting. This encourages large numbers of Indians to live and work on reservations where they are not enrolled.⁸

⁶ For the *amici* tribes, the 1980 Census shows the following percentages of Indians from other tribes in the total resident Indian population: Fort Peck Reservation - 17% of 4,246; Colville Confederated Tribes - 13% of 3,568; Rosebud Sioux Reservation 24% of 5,643; Warm Springs Reservation - 14% of 1,991; Colorado River - 22% of 1,967; Lummi - 11% of 1,259; Tulalip Tribes - 10% of 763; Quinault - 12% of 944; Winnebago - 46% of 1,098; Wind River - 22% of 4,147.

⁷ The following *amici* tribes afford a hiring preference to all Indians over non-Indians: Confederated Tribes of the Warm Springs Reservation, Lummi Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Tulalip Tribes, Colville Confederated Tribes and Winnebago Tribe. The Colville Indian preference law gives its enrolled members first priority. Colville Tribal Plan of Operation 45.1(c) 2.

⁸ The Winnebago Tribe has 122 Indian employees, of whom 25 are enrolled elsewhere. The Colville tribal government employs 75 Indians enrolled elsewhere. The Colville

(Continued on following page)

Indian reservation residents enrolled in other tribes and guests from other tribes participate fully in religious and social functions. Many tribal members, for example, participate in a regular and continual circuit of tribal traditional ceremonies; in hunting, fishing and gathering expeditions; in celebrations, dances, pow wows, and religious ceremonies; and, in sports (basketball, baseball, softball, rodeo, stick games) which provide year round formal and informal bases for the Indians of one reservation to travel to all the other reservations in the region. The length of stay ranges from weekend tournaments to multi-week encampments. Many tribes increase their police force for special events to handle increased incidents requiring law enforcement efforts. For example, the Warm Springs Reservation has 12,000 Indian visitors annually for pow-wows, traditional celebrations, the tribal fair, all-Indian sporting events, funerals and memorials, as well as private family and social visits. Significant numbers of criminal incidents occur during social events such as the Warm Springs Reservation's June tribal fair and the Christmas basketball tournament. The Fort Peck Reservation hosts six four-day events between June and August each year. Up to eight additional law enforcement officers are hired for each event.

As the above discussion shows, Indians present on the reservation, who are members of other tribes, are well integrated into the tribal community.

2. Tribes generally assert civil and criminal jurisdiction over Indians on their reservation who are enrolled in other tribes.

Tribal courts almost universally assert civil and criminal jurisdiction over all Indians within the tribes'

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tribal executive director, the highest administrative office, is enrolled in the Sioux Tribe of the Pine Ridge Reservation. The Colville tribal police chief is enrolled in the Yakima Tribe. The Fort Peck tribal industry employs 360, 70 of whom are Indians enrolled in other tribes.

jurisdiction. "Native American Tribal Court Profiles 1985" (Report by the Bureau of Indian Affairs Branch of Judicial Services profiling 144 tribal courts).⁹ In many tribes, sitting judges are Indians enrolled elsewhere. For example, 90% of Colville Confederated Tribes' *pro tem* trial panel of judges brought in to try cases where none of the local judges may sit, are members of other tribes. In addition, 70% of the judges appointed to the Colville Tribal Appellate Court are members of other tribes. In many tribes, service on juries is not limited to enrolled members.¹⁰

All of the *amici* tribes assert the authority to exercise criminal jurisdiction over all Indians present within their reservations. Statistics provided by *amici* demonstrate the impact in the tribal community of Indians enrolled elsewhere: Colorado River Tribes - 462 arrests of Indians enrolled elsewhere during the past five years; Confederated Tribes of the Warm Springs Indians Reservation - during 1988 alone, 324 out of 1385 criminal cases in tribal court involved Indians enrolled elsewhere; Lummi - in 1988 about 100 crime related calls involved non-Lummi Indians; Upper Skagit Tribe - from 1984 through May of 1989, 77 of 271 tribal court criminal cases involved Indians enrolled elsewhere; Winnebago Tribe - 91 criminal cases involved Indians enrolled elsewhere during 1989; Wind River - 500 prosecutions of Indians enrolled elsewhere in last five years. At the Rosebud Reservation

⁹ Of all the tribal courts profiled, only one that asserted criminal jurisdiction expressly limited its jurisdiction to members - the Judicial System of the Hannaville Indian Community in Menominee County, Michigan.

¹⁰ For example, all adult residents of the Colville Reservation are eligible to be called for jury duty, CTC § 4.2.01; all registered state voters of the Lummi Reservation may be called as jurors, Lummi Law and Order Code 1.5.01; the Upper Skagit Law and Order Code provides that service on juries is not limited to enrolled members; and, any Indian may sit on juries in the Winnebago Tribal court system.

the criminally accused, whether enrolled at Rosebud or not, are entitled to a public defender without cost.¹¹

In most cases neither local county prosecuting attorneys nor the United States attorneys make any distinction between enrolled members and other Indians when they refer Indians to the tribes for prosecution. A determination that tribes lack jurisdiction over Indians enrolled elsewhere would undermine effective law enforcement by negating the tribes' authority and complicating existing arrangements for cooperation with other local agencies. In fact, in the vast majority of the cases, the assertion of criminal jurisdiction appears to go unchallenged. As the Ninth Circuit said in the case at hand "[t]his case brings before us an issue of first impression. . . ." *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir. 1988).¹² For this Court to find that such jurisdiction does not exist would cause an upheaval of uncalculated proportions in the existing criminal justice system and may leave a jurisdictional void that, as a practical matter, other sovereigns will not fill. Furthermore, most reservations are located in isolated areas, far from state or federal law enforcement agencies that have little interest in law enforcement on reservations. As a practical matter, tribal police and court systems are the only ones available in Indian country.

¹¹ Any Indian prosecuted in tribal court would of course be provided the constitutional protections embodied in the Indian Civil Rights Act. 25 U.S.C. § 1302.

¹² One published tribal court opinion discussed the issue finding in favor of tribal court jurisdiction, but dismissed the case on other grounds. *Miller v. Crow Creek Tribe*, 12 Ind. L. Rep. 6008, *supra*.

II. INDIAN TRIBES RETAIN INHERENT CRIMINAL AUTHORITY OVER ALL INDIANS PRESENT WITHIN THEIR TERRITORY.

A. Statutory Approaches to Tribal Criminal Jurisdiction Indicate No Distinction Based on Membership in any Particular Tribe.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-99, this Court found that the assertion of federal jurisdiction over crimes by non-Indians in Indian country immediately after formation of the Union was persuasive evidence of Congress' intent to take away any tribal authority over non-Indians. The converse is true with regard to Indians within tribal territory, where Congress was careful from the outset to exempt from federal jurisdiction all crimes between Indians – without regard to which tribe the Indians belonged. This legislative approach reflected the reality that tribes continued to utilize their traditional customs and usages for controlling the behavior of all Indians present within their territory.

The earliest trade and intercourse acts provided for the punishment of non-Indians who committed crimes in Indian territory. The Trade and Intercourse Act of 1790 provided that citizens who committed crimes against Indians would be punished pursuant to the law of the "state or district to which he or they may belong." 1 Stat. 137, 138 (1790). Since Indians were not generally citizens until 1924, this and other statutes that followed had the effect of excluding from their coverage crimes by Indians against Indians. F. Cohen, *Handbook of Federal Indian Law* 287 n.54 (1982 ed.).

The first version of the Indian General Crimes Act, codified as amended at 18 U.S.C. § 1152, provided for federal jurisdiction over crimes committed by Indians or non-Indians if such actions would be a crime if committed in any federal enclave. Act of March 3, 1817, 3 Stat. 383. An important exception was enumerated, however,

so that federal jurisdiction would not lie for "any offence committed by one Indian against another, within any Indian boundary." *Id.*, reenacted in Act of June 30, 1834, ch. 161, 4 Stat. 729, 733. In *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), a non-Indian who alleged he was adopted into the Cherokee Tribe claimed that his prosecution was barred under the proviso to the Non-intercourse Act, Act of June 30, 1834, 4 Stat. 729. *Id.* at 572. The Court held he was not an Indian within the meaning of the Act and, more importantly, for the issue here, that the intent of the Act was to leave Indians "as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." *United States v. Rogers*, 45 U.S. at 572 (emphasis added). See *United States v. Quiver*, 241 U.S. 602, 604 (1916) (At an early period it became the settled policy of Congress to permit . . . offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.)

Indeed, this Court affirmed this view in *Oliphant* when it stated that the "'general object' of the congressional statutes was to allow Indian nations criminal 'jurisdiction of all controversies between Indians . . . and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.'" *Oliphant*, 435 U.S. at 204, quoting *In re Mayfield*, 141 U.S. 107, 115-116 (1891).

This approach was followed by the federal government for over 100 years after formation of the United States. Even when this uniform policy was abandoned, however, the United States carefully limited its assumption of jurisdiction. The Indian Major Crimes Act, codified as amended at 18 U.S.C. § 1153, was adopted in the aftermath of *Ex parte Crow Dog*, 109 U.S. 556 (1883), in which this Court held that there was no federal jurisdiction for prosecution of a murder of one Indian by another within the Indian country. See *United States v. Kagama*, 118 U.S. 375, 382-383 (1886). The act enumerated several crimes which, if committed by an Indian against the

person or property of another Indian, would be punishable in the federal courts. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. Congress no doubt could have distinguished on the basis of membership, but did not. This is in direct contrast to the federal government's early assumption of jurisdiction over crimes by non-Indians within Indian territory. This distinction from the treatment of non-Indians is consistent with the conclusion that tribes possess inherent authority over all Indians within their territory.

This approach reflected "a recognition that it would be unfair to apply white men's standards of justice to interactions exclusively between Indians, who belonged to a separate culture." *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (9th Cir. 1976) (Judge Kennedy dissenting), *rev'd*, 435 U.S. 191 (1978). It follows from this reasoning that Indians enrolled with other tribes, but present within the tribal territory, should be subject to tribal, rather than state, jurisdiction. They are Indians who are recognized as such and thus are beyond the reach of state authority. *Donnelly v. United States*, 228 U.S. 243 (1913).

As shown in section I above, Indians enrolled in other tribes stand on significantly different footing than non-Indians. Contrary to the Court's assertion in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980), Indians present within a tribe's jurisdiction in fact are treated differently than non-Indians. They have a special status under the law as federally recognized Indians. Moreover, unlike the situation in *Colville*, this is not simply an attempt to market a tax exemption. This Court in *Colville* found the tribal interest in marketing a tax exemption to be insignificant. In this case, the tribes seek to advance their critical interest in maintaining law and order on their reservations.¹³

¹³ Moreover, *Colville* is inapposite for another reason. This Court addressed the issue of *the State of Washington's civil*

Reliance should not be placed upon formal enrollment in the governing tribe, which is a modern creature of the BIA designed to ease administration of federal programs for Indians. F. Cohen, *Handbook of Federal Indian Law* 356 n.76 (1982 ed.). Indians may be members of an Indian community for many purposes and still not be formally enrolled. *Id.* Enrollment may be a useful criterion for determining that a person is an Indian, and for determining rights to distribution of property or other federal or tribal benefits, *id.*; F. Cohen *Handbook of Federal Indian Law* at 133 (1942 ed.), but its usefulness breaks down when it becomes an artificial limit on a tribe's ability to maintain law and order in its community.¹⁴ The artificiality of enrollment is most vivid in light of the makeup of local tribal communities. See pp. 25-27, *infra*.

(Continued from previous page)

authority to tax the Yakima Nation's sale of cigarettes to "Indians resident on the reservation but not enrolled in the governing Tribe." 447 U.S. at 160. The Court concluded that the state could exercise its civil jurisdiction because there were no countervailing tribal interests which were affected. At the same time, however, it is clear that the Tribe retained taxing jurisdiction over the non-member Indians, notwithstanding the fact that Washington could exercise concurrent jurisdiction. *Id.* at 152-153. Accordingly, nothing in the Court's holding or analysis speaks to the issue of criminal authority over Indians enrolled elsewhere present within tribal territory.

¹⁴ While it is a civil statute, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, also reflects the federal policy of leaving jurisdiction over all Indians to the tribes. Under the ICWA, a tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who is domiciled on that tribe's reservation. 25 U.S.C. § 1911(a). No distinction is made between enrolled members and other Indians. In addition, the ICWA provides for adoptive placement of Indian children, in order of preference, with (1) a member of the child's extended family, (2) other members of the child's tribe, or (3) other Indian families. 25 U.S.C. § 1915(a). See generally, *Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989).

B. Treaties and Executive Branch Actions Reflect the Assumption that Crimes Involving only Indians were Subject to Tribal Jurisdiction.

The treaties executed by the United States and the tribes also reflect an understanding that the tribes retained criminal authority over all Indians present within their territory. In *Oliphant*, this Court reviewed the history of early treaties with certain tribes and found that tribal jurisdiction over offenses committed by non-Indians was generally precluded, as evidenced by occasional requests in Congress that a tribe be granted such criminal jurisdiction. 435 U.S. at 197-198. The Choctaw Tribe, for example, had included a provision in their treaty which affirmatively requested that the United States Congress "grant to the Choctaws the right of punishing by their own laws any white man who shall come into their Nation, and infringe any of their national regulations." *Id.* (citation omitted) (emphasis added). There was a consistent pattern pursuant to which the federal government asserted exclusive jurisdiction over crimes committed by or against non-Indians throughout tribal territory. *Oliphant*, 435 U.S. at 204. Indeed, "[u]ntil 1855 treaties did not generally provide a forum for the trial of intra-Indian or intra-tribal crimes, the prevailing assumption apparently being that such crimes were within the exclusive province of tribal self government." R. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 955.¹⁵ At the

¹⁵ There were provisions in isolated treaties, however, which granted federal jurisdiction over Indians who committed "depredations" against other Indians. Taken in context, however, it seems clear that the federal government's interest was in preventing hostile acts which might lead to war among the tribes, rather than to usurp traditional tribal criminal authority over individual Indians who were part of the tribal community. See, e.g., Treaty with the Snakes, Art. 4, 14 Stat. 683 (1865).

same time, it is apparent that the federal government was aware that tribal territory often included Indians who belonged to other than the host tribe. See treaties discussed in section III, *infra*.

An 1883 attorney general's opinion, which considered federal prosecution of an Indian of one tribe who murdered an Indian of another tribe on a third tribe's reservation, concluded that only a tribal court prosecution was possible. 17 Op. Atty. Gen. 566 (1883). The Opinion advised that federal prosecution would not lie because of the Indian *versus* Indian nature of the crime and that "unless demand for [the Indian defendant's] surrender shall be made by one or other of the tribes concerned," he would have to be released. *Id.* at 570. This is in direct contrast to the opinions relied on by this Court in *Oliphant* which specifically state that tribes lack jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 199. Thus, the only authority speaking to the precise fact situation involved in the case at bar concluded that tribal authority extended over Indians of other tribes.

In his opinion on the "Powers of Indian Tribes," the Solicitor for the Department of Interior assumed that tribes retained jurisdiction over criminal activities by any Indians within tribal territory. As he stated:

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish the subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

Powers of Indian Tribes, 55 I.D. 14, 57 (1934) (emphasis added).¹⁶ Consistent with the assumption that tribes have jurisdiction over alien Indians in their territory, in 1883 the Bureau of Indian Affairs established Courts of Indian Offenses which today exercise criminal jurisdiction over any Indian who is a member of any recognized tribe. 25 C.F.R. § 11.2(c). The jurisdiction of these courts extended to any Indian "who is a member of any recognized tribe now under federal jurisdiction." Law and Order Regulations, ch. 1, § 1 (Nov. 27, 1935), originally codified at 25 C.F.R. 161.1 - 161.306. While these courts were once described as educational, they are now viewed as exercising residual tribal powers. See F. Cohen, *Handbook of Federal Indian Law* at 251 (1982 ed.) citing *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888) and *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); and 55 I.D. at 64. Regardless of their original purpose, however, the important point is that the federal government determined it appropriate to subject all Indians to the jurisdiction of these courts.

Hence, the actions of Congress and the Executive Branch, and the cases interpreting them, all reflect the common assumption of all three branches of the federal government that Indian tribes retained criminal jurisdiction over all Indians within their territory. Moreover, historical and anthropological evidence supports the conclusion that tribes necessarily, and in fact, exercised criminal jurisdiction over all Indians within their territory. At minimum, however, tribes certainly exercised and retained jurisdiction over Indians who, like Duro, became part of the tribal community.

¹⁶ This Court in *Oliphant* interpreted federal statutes and treaties as divesting tribal authority over non-Indians, but that holding does not undercut the common assumption that tribes had inherent jurisdiction over alien Indians within their territory.

III. TRIBES RETAIN INHERENT CRIMINAL AUTHORITY OVER ALL INDIANS WHO MAINTAIN RELATIONS WITH THE TRIBAL COMMUNITY.

As shown above, tribes historically exercised criminal jurisdiction over all Indians present in their territory and the federal government purposefully left offenses involving Indians only to tribal jurisdiction. The federal government asserted no jurisdiction over such offenses until 1885. The logical inference is that tribes retained jurisdiction over all Indians present within their territory regardless of tribal affiliation.

The facts of this case, however, present the narrower issue of whether an Indian enrolled elsewhere, who resides on a reservation and maintains relations with the tribal community, can be prosecuted by the local tribe for a crime he commits on the reservation. An examination of the legal, social and political aspects of tribal communities shows that Indian tribes retain the inherent authority to prosecute such Indians as they would any other tribal member. See *United States v. Wheeler*, 435 U.S. 313 (1978).

The earliest pronouncements of Chief Justice John Marshall referred to tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832). In *United States v. Montoya*, 180 U.S. 261, 266 (1901), the Court defined "tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." This notion of tribes as "communities" was continued in *United States v. Sandoval*, 231 U.S. 28 (1913), where the Court found that the Indian pueblos in New Mexico were Indian country for purposes of federal criminal jurisdiction because they were "dependent Indian communities." *Id.* at 46. Congress later codified that language as an

additional term of place to describe Indian country. See 18 U.S.C. § 1151(b).

Many early treaties reflect the understanding that tribal communities were diverse and tribes had the power to control all those within their territory who were considered to be part of the tribal community. The Cherokee Nation, secured the right "to make and carry into effect such laws as they deem necessary for the government and protection of the persons and property within their own country belonging to their people *or such persons as have connected themselves with them.*" Treaty with the Cherokee, Art. 5, 7 Stat. 478 (1835) (emphasis added). The Treaty with the Choctaw provided: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of *all the persons and property that may be within their limits. . . .*" Art. 4, 7 Stat. 333 (1830). Treaty provisions requiring tribes to "deliver up" any Indian who has committed a capital crime against whites or citizens support the understanding that tribes have jurisdiction over any Indian against Indian crime in their communities. See, e.g., Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786), "any Indians of the Shawnee Nation *or other Indians residing in their towns* who commit murder or robbery 'or do any injury' to the United States;" and Treaty with the Creeks requiring delivery to the United States of any Creek Indian "*or person residing among them*" who commits a capital crime against a citizen of the United States. Art. 8 & 9, 7 Stat. 37 (1790) (emphasis added).

This concept of tribal community has also been used in the Court's definition of who is an Indian for purposes of federal Indian criminal statutes. In *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977), the Court noted that among the lower federal courts "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations

with the Indians thereon.' " Quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938); see also, *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) (dictum), *vacated on other grounds*, 421 U.S. 944 (1975). In *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), the court said: "We are convinced that the overwhelming weight of authority, both judicial and statutory, requires the conclusion that a child of an Indian mother and half-blood father . . . who himself lives on the reservation and maintains tribal relations and is recognized as Indian, is to be considered an . . . 'Indian' as used in the [criminal] jurisdictional statute in question. The lack of "enrollment . . . is not determinative of status." In *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), the court said, "[e]nrollment or lack of enrollment is not determinative of Ives's status as an Indian." The court found, without reciting it, substantial evidence in the record sufficient for a jury to find Ives was an Indian. In *United States v. Mazurie*, 419 U.S. 544, 557 (1975), the Court ruled that Indian "tribes . . . are a good deal more than 'private, voluntary organizations.' " The reality of present day tribal communities reveals that they consist of all Indians who are part of the community, not just of those who are technically enrolled Indians.

A defendant's recognition as an Indian by the tribal community has been held a sufficient basis for conferring federal criminal jurisdiction over him.

Courts have generally followed the test first discussed in *United States v. Rogers*, 45 U.S. 567 (1845): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian. . . . In determining whether a person is recognized as an Indian, courts have looked to both recognition by a tribe or society of Indians or by the federal government.

United States v. Dodge, 538 F.2d 770, 786-787 (8th Cir. 1976), *cert. denied, sub nom. Cooper v. United States*, 429 U.S. 1099 (1976) (emphasis added). Thus, while tribal

"[e]nrollment is the common evidentiary means of establishing Indian status, . . . it is not the only means nor is it necessarily determinative." *United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979). See also, F. Cohen, *Handbook of Federal Indian Law* at 2-5 (1982 ed.).

An Indian who maintains relations with a given tribal community is a member of that tribe as much as, and sometimes more than, an Indian who is technically enrolled there. To treat such an Indian differently from an enrolled member for purposes of tribal criminal jurisdiction fails to recognize the history and present circumstances of tribal communities, as well as the longstanding legislative scheme for the division of prosecutorial authority in Indian country.

CONCLUSION

The federal government's treatment of criminal offenses among Indians supports the proposition that Indian tribes retain criminal jurisdiction over all Indians present within their territory. However, this Court need not reach the issue as to *all* Indians since the defendant Duro is indisputably an Indian who was voluntarily maintaining tribal relations with the Salt River Tribe at the time of the alleged offense. He was residing on the Salt River Tribe's reservation with a tribal member and was employed in a tribally owned and operated construction company. In short, he was plainly a voluntary member of the tribal community and, as such, clearly within

the class of Indians the federal government assumed would remain under tribal jurisdiction.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALBERT DURO,
Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Dept. of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE ON BEHALF OF
SIX AMERICAN INDIAN TRIBES

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October 6, 1989

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17 Ops. Atty. Gen. 566 (1883)	15
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American Indian Policy Review Comm'n, Report on Federal, State and Tribal Jurisdiction (1976)	18

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-6546

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Dept. of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICI CURIAE ON BEHALF OF
SIX AMERICAN INDIAN TRIBES**

This brief is filed on behalf of six American Indian tribes and tribal agencies: Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Menominee Tribe of Wisconsin; Metlakatla Indian Community of Alaska; Miccosukee Tribe of Florida; Oglala Sioux Tribal Public Safety Commission of the Oglala Sioux Reservation, South Dakota, and Navajo Nation.

All of these tribes and tribal agencies operate law and order systems on their respective reservations, under con-

tracts with the Bureau of Indian Affairs pursuant to 25 U.S.C. §§ 450-450n. All of them have understood that they had criminal jurisdiction over all Indians on the respective reservations, whether members or not, and until recently have been consistently exercising that jurisdiction. As governments with serious law enforcement responsibilities to the reservation communities, these amici strongly urge affirmance of the judgment below.

INTERESTS OF AMICI CURIAE

Amicus THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, North Dakota ("Three Affiliated Tribes"), is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. The Tribe inhabits the Fort Berthold Reservation, containing about 1,000,000 acres. The Tribe's sovereign capacity has been recognized by treaties and statutes of the United States. *See* 7 Stat. 259, 261, 264 (1825); 11 Stat. 749 (1851); 26 Stat. 1032 (1891); 2 C. Kappler, *Indian Affairs—Laws and Treaties* (1904) [hereinafter "2 Kappler"] 237-242, 594.

The Indian population of the Fort Berthold Reservation is approximately 3,000, which includes 188 Indians who are members of tribes other than the Three Affiliated Tribes. Most of these are married to members of the Three Affiliated Tribes and are generally considered to be part of the Indian community. In addition, 688 nonmember Indians own interests in allotted lands within the Fort Berthold Reservation, and an estimated 6,000 nonmember Indians visit the Reservation each year to attend powwows and other social events.

Pursuant to the Tribal Code, the Tribal Court of the Three Affiliated Tribes exercised criminal jurisdiction over all Indians within the Reservation, members and nonmembers alike, until shortly after the decision of the Eighth Circuit in *Greywater v. Joshua*, 846 F.2d 486

(8th Cir. 1988). In the five year period from January 1984 through December 1988, 332 nonmember Indians were prosecuted in the Tribal Court under the laws of the Three Affiliated Tribes.

Amicus MENOMINEE INDIAN TRIBE ("Menominee Tribe") is a federally recognized tribe inhabiting the Menominee Indian Reservation in Wisconsin. The Tribe's sovereign capacity has been recognized by several treaties, principally the Treaty of May 12, 1854, 10 Stat. 1064, 2 Kappler 626, which established the Menominee Reservation. Federal recognition of the Menominee Tribe was terminated in 1954, 68 Stat. 250, but restored in 1973, 87 Stat. 770, 25 U.S.C. §§ 903-903f.

The Reservation contains approximately 235,000 acres. The 1986 reservation population was 3,939, of whom some 3,372 are members of the Menominee Tribe, some 194 are members of other Indian tribes, and some 373 are non-Indians.

Pursuant to the Tribe's Law and Order Code and Tribal Ordinance No. 79-14, the Tribe asserts criminal jurisdiction over all Indians within the Reservation, and its tribal police department enforces the law accordingly. The Menominee Tribal Court exercises criminal jurisdiction over all Indians, and its exercise of jurisdiction has never been challenged by a nonmember Indian.

Amicus METLAKATLA INDIAN COMMUNITY ("Community") is a federally recognized Indian Tribe inhabiting the Annette Islands Reservation in Alaska. This Reservation, which is the only federal Indian reservation in Alaska, was established by Congress for the Metlakatla Indians "and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495.

The 1987 population of the Reservation was 1,481, of whom 1,303 were members of the Community, 47 were nonmember Indians or Alaska Natives, and 178 were non-Indians. Most of the nonmember Indians or Alaska

Natives are married to members of the Community. Pursuant to its Law and Order Code, the Community asserts criminal jurisdiction over all Indians and Alaska Natives within the Reservation, and this assertion of jurisdiction has never been challenged. Given the isolated island location of the Community, the exercise of criminal jurisdiction by the Community over all Indian and Alaska Native residents is considered essential to effective law enforcement.

Amicus MICCOSUKEE TRIBE OF INDIANS ("Miccosukee Tribe") is a federally recognized Indian tribe in Florida, which occupies lands reserved by the Secretary of the Interior within the Everglades National Park, and a federal reservation north of the Park. They came under U.S. protection in the Treaty of Sep. 18, 1823, 7 Stat. 224, 2 Kappler 203.

Within the land areas under the jurisdiction of the Miccosukee Tribe the total population is estimated to be 525, which includes 278 tribal members and 247 nonmember Indians. Of the nonmember Indians, the greater part are so-called "independent" Indians, who are eligible for enrollment in the Tribe but who have elected not to become enrolled, and the remainder are members of the culturally related Seminole Tribe of Florida. Thus, while approximately 53 percent of the population of the community is comprised of enrolled tribal members, there is a very high degree of cultural homogeneity within the community. In addition to resident Indians, members of the Seminole Tribe are frequent visitors to the areas under the Miccosukee Tribe's jurisdiction. Under its Law and Order Code, the Tribe asserts criminal jurisdiction over nonmember Indians, and the Tribe's Public Safety Department enforces the Tribe's laws accordingly.

Amicus OGLALA SIOUX TRIBAL PUBLIC SAFETY COMMISSION ("Commission") is a corporation of the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota. The Commission was chartered in 1977 for the purpose of

administering law enforcement, by the Tribe, which is the federally recognized tribal governing body of the Pine Ridge Reservation. The Oglala Sioux Tribe is one of the seven tribes of the Great Sioux Nation. The sovereignty of the Nation and of its constituent tribes has been recognized in treaties and statutes of the United States, *e.g.*, 7 Stat. 252 (1825), 2 Kappler 230; 11 Stat. 749 (1851), 2 Kappler 594; 15 Stat. 635 (1868), 2 Kappler 998; 25 Stat. 888 (1877).

The Pine Ridge Reservation is the second largest reservation in the United States (after the Navajo Reservation) and includes some 2 million acres. The Indian population of the Reservation is approximately 21,250, which includes 18,250 who are enrolled members of the Oglala Sioux Tribe. The other 3,000 Indians are members of other tribes, almost all of whom are married to Oglala tribal members. Of the Indians of other tribes, approximately 80 percent are members of other Sioux Tribes and are thus closely related in culture to the Oglala Sioux Tribe. Pursuant to the Oglala Sioux Tribal Penal Code, the Commission exercises criminal jurisdiction over all Indians within the Reservation, members and nonmembers alike.

Amicus NAVAJO NATION is the largest federally recognized Indian tribe, comprised of approximately 173,000 members. The Navajo Reservation, which contains approximately 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah, was established by the Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015. More than 9,000 nonmember Indians reside on the Navajo Nation. Of those, an estimated 1,200 nonmember Indians are married to Navajos. About 1,100 nonmember Indians are being educated in elementary and high schools within the Navajo Reservation. Currently, some 1,544 nonmember Indians are employed on the Navajo Reservation.

The Navajo Nation currently exercises criminal jurisdiction over nonmember Indians who violate Navajo laws. The Navajo Law and Order Code applies to persons defined as any natural Indian individual, 17 N.T.C. § 208 (17). Some 150 nonmember defendants from a variety of tribes have been prosecuted by the Navajo Nation within the past five years.

The Navajo Nation Bill of Rights establishes explicit rights of the people within the Navajo Nation and limitations upon the exercise of government power. The rights provided to all Indian defendants go beyond the requirements of the Indian Civil Rights Act, 25 U.S.C. § 1302. For example, persons accused of a punishable offense, but unable to afford counsel, are entitled to have counsel appointed for them. 1 N.T.C. § 7.

SUMMARY OF ARGUMENT

While this Court has indeed pronounced dicta on several occasions to the effect that tribes have been divested of their jurisdiction over nonmember Indians, in none of the cases was the issue actually involved or adversarially briefed. Therefore, this Court should hear the issue *de novo* on this occasion.

This Court has ruled that a tribe's aboriginal jurisdiction continues unless and until divested by the United States expressly or implicitly. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208 (1978). The pattern of dealings between the United States and the Indian tribes in the early days clearly implies that Congress and the Executive Branch had no intention or interest in divesting the tribes of their preexisting jurisdiction over nonmember Indians. Modern living patterns on Indian reservations show a need for such jurisdiction, and an assumption that it has existed. The Executive Branch has ruled that tribes have not been divested of such jurisdiction.

ARGUMENT

INDIAN TRIBES POSSESS CRIMINAL JURISDICTION OVER NONMEMBER INDIANS AS AN ASPECT OF ORIGINAL TRIBAL SOVEREIGNTY THAT HAS NEVER BEEN DIVESTED

A. The Issue Has Never Been Adversarially Briefed to this Court.

In 1978 this Court issued an opinion containing some potentially critical dicta, to the effect that tribes do not have jurisdiction over nonmember Indians.¹ Subsequent opinions have reiterated the dicta.² Presumably, the dicta

¹ *United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe"). The *Wheeler* case also said (p. 326) that the *Oliphant* case, *supra*, "held [that tribes] cannot try nonmembers in tribal courts." No local page cite in *Oliphant* was given, and we were unable to find where *Oliphant* specifically supports the quoted holding; the closest place may be p. 208.

² *Montana v. United States*, 450 U.S. 544, 565 (1981) ("... the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); cf. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853 n.14 (1985) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-142 (1982), where this Court used "nonmember" in quotes or text without seeming to attach any particular significance to it.

See also *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), which held that tribes could not share their state tax immunities with white customers. The Court indicated in dicta that nonmember Indians were the same as whites for this purpose. At 161. That involves considerably different policy than whether a tribe has *criminal* jurisdiction over a nonmember Indian who violates tribal law. Therefore, we respectfully suggest that this Court's dicta in that case is of only limited relevance here. We note that this Court has allowed tribes to share certain immunities with nonmembers. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (unanimously held, tribe could allow non-Indians to hunt on reservation free of state game regulation); see also *Donahue v. California Justice*

was speaking only of *criminal* jurisdiction, since it is well settled that tribes clearly do have *civil* jurisdiction over non-Indians³ and therefore, *a fortiori*, have *civil* jurisdiction over nonmember Indians.

In none of these cases were nonmember Indians involved, nor was the nonmember Indian issue adversarially briefed,⁴ which means this Court never had the benefit of adversarial exposition of the relevant treaties, statutes, and congressional and executive policy. We hope and assume that now that the issue has been adversarially briefed for the first time, the Court will make its decision based on this briefing, and not on the earlier dicta.

B. The Tribes' Jurisdiction Over Nonmember Indians Has Never Been Divested.

No treaty or statute *expressly* divests Indian tribes of their pre-Columbian jurisdiction over nonmember Indians.⁵ However, this Court has said that tribes may

Court, 15 Cal.App.3d 557, 93 Cal. Repr. 310 (1971), *cert. denied*, 404 U.S. 990 (tribe could allow nonmember Indian resident to fish on reservation free of state regulation).

³ F. Cohen, *Handbook of Federal Indian Law* (1982), pp. 253-4; *Merrion*, *supra* (tribes have jurisdiction to tax whites on the reservation); *Nat'l Farmers Union*, *supra*, 471 U.S. at 854, and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (tribe has jurisdiction over civil claims by Indians against whites); *Brendale v. Confederated Yakima Tribes*, 109 S. Ct. 2994 (1989) (tribe has zoning power over white-owned fee land in part of reservation). *But see Montana*, *supra* (tribe has no civil regulatory power to restrict whites hunting on their own fee land within the reservation).

⁴ The State in the *Colville* case (a *civil* jurisdiction case) argued for several pages on the nonmember Indian question (State's brief in Docket 78-630, pp. 91-96), but the tribe did not mention the point. Both briefs were over 100 pages long. The issue was not briefed by either side in *Oliphant*, *Wheeler*, *Montana*, *National Farmers*, or *Merrion*.

⁵ This Court has recognized that prior to the arrival of Europeans in North America, the Indian tribes were independent political

be divested of their powers *by implication* "as a necessary result of their dependent status."⁶ In *Oliphant* (p. 6 above), this Court held that tribes' criminal jurisdiction over white persons had been divested by implication.⁷

The reason for implied divestiture is the assumption that Congress would never have intended—or tolerated—white people being punished by Indian tribes who lacked the Anglo-American traditions of Due Process, Equal Protection, and other rights in the Bill of Rights. As this Court stated in *Oliphant*:

"[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210.⁸

communities possessing all attributes of sovereignty. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

⁶ "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, note 1 above, at 323.

⁷ "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210. Also: "Indian tribes are prohibited from exercising those powers . . . 'inconsistent with their status.'" *Id.* at 208. These statements by the Court indicate that the implicit divestiture occurred when a tribe submitted to the overriding sovereignty of the United States, *i.e.*, when its status became that of a dependent sovereign. However, this Court has also said that tribal powers are not implicitly divested merely by virtue of the tribe's dependent status. *Colville*, note 2 above, 447 U.S. at 153.

⁸ It could be argued that the 1924 general grant of U.S. citizenship to all Indians (8 U.S.C. § 1401(b)) had the effect of guaranteeing to all Indians the protections of the Anglo-American legal

However, at the formation of the Union and the adoption of the Bill of Rights, Indians were not citizens, and any traditions of individual liberties that tribes may have had were necessarily derived from much different sources. There is no evidence that Congress wished to limit a tribe's authority to punish Indians of other tribes without the safeguards contained in the Bill of Rights. That Congress did not intend to disturb a tribe's existing jurisdiction over a crime committed by a member of a co-equal sovereign tribe, is shown by the pattern of treaties with the tribes, and two important statutes enacted by Congress (18 U.S.C. §§ 1152 and 1153), more fully explained as follows:

1. *Early Treaties Between the United States and Indian Tribes Support the Implication that Congress Expected Tribes to Handle Punishment of Inter-tribal Indian Crimes.*

As noted by this Court in *Oliphant*, 435 U.S. at 197 n.8, a number of early treaties have "bad men" clauses. These are typically clauses that addressed two serious problems relating to peace on the frontier: one, that "bad men" among the Indians would leave the reservation, commit crimes against white people and take refuge back on the reservation; and two, that "bad men" among the whites would come on the reservation, commit crimes against the Indians, then return to the safety of the white community. The typical language was to the effect that the Indians agreed to deliver to the U.S. bad Indians who

traditions embodied in the U.S. Constitution. However, no case of which we are aware supports this argument, and cases after 1924 have held that tribes are not, generally speaking, subject to limitations of the U.S. Constitution in punishing Indian lawbreakers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978); see Cohen, *supra*, 663-672 (1982). In 1968 Congress mooted the point by extending most limitations imposed by the Bill of Rights to Indian tribunals. Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302.

harmed whites, in order that the U.S. would punish them and thus head off any vigilante action by the whites. Also, the U.S. agreed that any bad white man who harmed Indians would be punished by the U.S., to head off Indian retaliatory raids on whites. These provisions may be readily reviewed by going through the treaties gathered at 2 Kappler.

We reviewed scores of treaties up to 1871 (the end of the Indian treaty-making period), looking for indications one way or the other that the United States thought that Indians injuring other Indians was considered a problem that might be solved by having the U.S. take responsibility for punishing them. These treaties are too numerous to quote or cite (they are chronologically arranged in 2 Kappler), but any reader will see from them that crime by Indians against Indians on an individual level (as opposed to tribe against tribe) was not mentioned as a problem. It was presumptively left up to the tribes to handle as they saw fit.⁹

Following the reasoning of *Oliphant* (that tribes have jurisdiction unless Congress took it away, or unless such jurisdiction would deprive whites of their Bill of Rights protections), it is clear that nothing in the early treaties as a policy matter implicitly divested tribes of jurisdiction to punish crimes on their reservation committed by Indians from other tribes. In fact, the clear implication is just the reverse.

⁹ We did find a few relatively modern treaties that arguably gave federal jurisdiction over Indians who committed crimes against Indians of other tribes. See, e.g., Treaty with the Sioux and Arapaho, 15 Stat. 635 (1868), 2 Kappler 998; Cheyenne and Arapaho, 15 Stat. 593 (1867), 2 Kappler 984. But none of the early treaties did, and even the few later ones that did may have been speaking of Indian victims who had severed their tribal relations.

2. *The Indian Country Crimes Act (18 U.S.C. § 1152) Supports the Implication that Congress Expected Tribes to Handle Punishment of Inter-tribal Indian Crimes.*

Title 18 U.S.C. § 1152, the "Indian Country Crimes Act,"¹⁰ states:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country [as defined in 18 U.S.C. § 1151].

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."¹¹ Emphasis added.

The original purpose of section 1152 was to establish a means of punishing whites who committed crimes against Indians within reservations. Such a means of punishment was necessary in order to attempt to main-

¹⁰ F. Cohen, *Handbook of Federal Indian Law* 287, n.50 (1982), uses the term "Indian Country Crimes Act" as more descriptive than the more commonly used "General Crimes Act."

¹¹ This section has its roots in the early treaties and in the Indian Trade and Intercourse Acts enacted between 1790 and 1834. See Cohen, at 287. From 1790 until 1817, only crimes by non-Indians against Indians were punishable in federal courts under the Indian Country Crimes Act. *Id.* at 291, n.81. In 1817, Congress extended federal jurisdiction to crimes by Indians against non-Indians. *Id.* This provision was reenacted in 1834. Act of June 30, 1834, 4 Stat. 729, 733. In 1854, the tribal punishment and treaty exceptions were added. Act of Mar. 27, 1854, 10 Stat. 269, 270. No substantive amendments to § 1152 have been made since then.

tain peace on the frontiers, as Congress was concerned with "providing effective protection for the Indians 'from the violences of the lawless part of our frontier inhabitants.'" ¹² The 1817 amendment added a measure of symmetry by providing that Indians who committed crimes against whites could also be tried and punished in federal courts.

By enacting an exception for crimes "by one Indian against another," Congress expressly recognized that such crimes were left to the tribes to handle. The face of the statute and its history¹³ make no distinction between intra- and inter-tribal Indian crimes—the exception on its face covers all. Both Congress and the Executive Branch were aware that within the territory of many Indian tribes, Indians of other tribal affiliations could be found, either as residents or as visitors.¹⁴ Congress's concern obviously was with interracial crimes only.

¹² *Oliphant, supra*, 435 U.S. at 201, quoting Seventh Annual Address of President George Washington.

¹³ The House committee report on the 1834 enactment states: "It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, at any place within their own limits." H.R. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis in original), quoted in Cohen, *supra*, at 117. This House committee report also states that it would be inconsistent with some treaty provisions for Congress to extend its criminal jurisdiction "to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens." *Id.*

¹⁴ *E.g.* (emphasis added *passim*): Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786), provides that "any citizen of the United States, who shall do an injury to any Indian of the Shawanoe nation, or to any other Indian or Indians residing in their towns and under their protection, shall be punished according to the laws of the United States." Similarly, Treaty with the Cherokee Tribe, Article VI, 7 Stat. 18 (1785); 2 Kappler, 8, 9-10, provides: "If any Indian or Indians, or persons residing among them, or who shall take refuge in their nation, shall com-

In *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), a white man was charged in federal court for the alleged murder of another white man within the Cherokee Nation in Indian country. Both the defendant and the victim were whites who resided within the Cherokee Nation, who had married Cherokee women, and had been adopted into the tribe. Defendant argued that this was an Indian against Indian crime, so that the U.S. had no jurisdiction under § 1152. This Court rejected the argument and held that:

“... the exception [in § 1152] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. *It does not speak of members of a tribe, but of the race generally—of the family of Indians*; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.” 45 U.S. at 573 (emphasis added).

This Court again construed § 1152 in *In re Mayfield*, 141 U.S. 107, 115-116 (1891), dealing with an 1866 Cherokee treaty:

“The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be *consistent with the safety of the white population with which*

mit a robbery, or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation, or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States;” Article V of the Treaty with the Choctaws is virtually identical. 7 Stat. 21 (1786), 2 Kappler, 11, 12. Similar provisions are found in Articles VIII and IX of the Treaty with the Creeks, 7 Stat. 35 (1790), 2 Kappler, 25, 27, and Articles X and XI of the Treaty with the Cherokees, 7 Stat. 39 (1792), 2 Kappler, 29, 31. Similarly, the Treaty with the Six Nations, Article VI, acknowledges that the delivery of goods by the United States to the Six Nations was to be for the benefit of the Six Nations “and the Indians of the other nations residing among and united with them.” 7 Stat. 44 (1794), 2 Kappler, 34, 36.

they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. . . . The general object of these Statutes is to vest in the courts of the [Cherokee] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.” (Emphasis added.)

If in enacting § 1152 it had occurred to Congress that tribes would not or should not have criminal jurisdiction over nonmember Indians, one would suppose that Congress would have said something about it. Congress’s silence here seems to be evidence of its satisfaction in 1834 that all Indian-against-Indian crimes continued to be subject to tribal laws, not federal. There is no evidence that Congress has ever changed its hands-off position on this point.

The Executive Branch has shared this view since at least as early as 1883. In that year, the Secretary of the Interior asked the Attorney General for advice on an inter-tribal Indian crime. The Attorney General advised that the federal courts did *not* have jurisdiction over a Creek who murdered an Arapaho on the Pottawatomie Reservation.¹⁵ The Attorney General indicated that the accused Indian could be surrendered on demand to

“one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice” *Id.* at 570.

¹⁵ 17 Ops. Atty. Gen. 566 (1883), cited in Cohen, *supra*, at 146 n.220 (1942 ed., not 1982 ed.). Cf. also a 1937 opinion of the Interior Solicitor, indicating that tribal jurisdiction over nonmember Indians would lie if the tribe amended its constitution to so declare. 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 736.

The Attorney General also cited the *Rogers* case, *supra*, in which this Court referred to § 1152 as not speaking “of members of a tribe, but of the race generally” (See fuller quotation p. 14, above.)

3. The Major Crimes Act (18 U.S.C. § 1153) Supports the Implication that Congress Expected Tribes to Handle Punishment of Inter-tribal Indian Crimes.

The Major Crimes Act provides for federal jurisdiction over major crimes committed by “any Indian . . . against . . . another Indian or other person” Nothing is said about any requirement that both Indians must be members of the same tribe. This Act was passed in 1885 as a result of “congressional displeasure” with this Court’s decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (which held that the federal courts did not have jurisdiction over a Sioux who murdered another Sioux on the Sioux Reservation). Cohen, *supra* (1982 ed.) at 300. As the Court of Appeals below said,

“That statute [§ 1153] punishes ‘Indians’ who commit crimes in Indian country. That usually means that the crime is committed on some tribe’s reservation ‘and the fair inference is that the offending Indian shall belong to *that or some other tribe* . . . [the statute’s] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of a reservation.’ *United States v. Kagama*, 118 U.S. 375, 383 (emphasis added). The statute has *never* been restricted in its application to Indians who are members of the ‘host’ tribe.” 851 F.2d at 1143 (emphasis in original).

As the Court of Appeals below realized, the question is not whether § 1153 *grants* jurisdiction to tribes to punish nonmembers, but whether it *divests* such jurisdiction. Clearly the Major Crimes Act did divest a tribe’s exclusive jurisdiction to punish major crimes, but it said nothing of depriving a tribe of its power to punish minor crimes committed by nonmembers. Furthermore, this

Court’s *Kagama* language (quoted p. 16 above), that § 1153 applies without regard to whether the perpetrator and the victim are of the same tribe, suggests that that question also does not matter in the case of *minor* crimes, the kind of tribes are most concerned with as a practical matter.

C. The Modern Situation on Reservations Argues That Tribes Should Continue to Exercise Criminal Jurisdiction Over Nonmember Indians.

The foregoing Section B indicates an early shared assumption on the part of all three Branches that Indian tribes *did* have criminal jurisdiction over nonmember Indians on the reservation, and that they would continue to do so. The modern policy considerations are to the same effect.

The populations of Indian reservations are less homogeneous today than they were in the early years of the United States. Not only do most tribal communities have members of other tribes mingling with the resident tribe’s members, but in many cases the United States for its own purposes has set up reservations occupied *and governed* by two or more tribes jointly.¹⁶ For reservations with tribal courts (which today means most reservations), we understand the overwhelming majority routinely exercise jurisdiction over nonmember Indians. That is certainly true for the six amici tribes. It would strike those tribes as strange indeed to suggest that enforcing law and order jurisdiction over all Indians in the tribal

¹⁶ For example, amicus Three Affiliated Tribes of the Fort Berthold Reservation (Mandan, Arikara and Hidatsa) has a single government and court system for all three tribes. In H. Rept. 2503, 82d Cong., 2d Sess. (1953), one of the recognized compendia of Indian data, the list of reservations, pp. 687-716, includes some 69 reservations where members of two or more named tribes reside, most of them, we understand, having joint governments. If subtribes of large Indian Nations (such as Sioux and Chippewa) are included, the figure is higher still.

community, members and nonmembers alike, is not essential to the peace of the reservation, one of the most important functions of any government. If the resident tribe is not going to cover domestic violence, disorderly conduct, driving while intoxicated, etc., who will? ¹⁷

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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October 6, 1989

¹⁷ If the perpetrator and victim are Indians, the federal apparatus is unavailable for minor Indian-against-Indian crimes on reservations. The only federal law that could grant jurisdiction is the Assimilative Crimes Act, 18 U.S.C. § 13, which only applies to Indians via 18 U.S.C. § 1152, which, as noted above, has a disclaimer for Indian-against-Indian crimes.

Even if states wanted to assume jurisdiction, they could not unless Congress has authorized them to assume jurisdiction over Indians on reservations under Public Law 280 (18 U.S.C. § 1162, 25 U.S.C. § 1321) or otherwise, which includes 9 states with full, and 8 states with partial, criminal jurisdiction. Even in those states that have full or partial criminal jurisdiction over Indians (which incidentally does not include Arizona), the record of law enforcement for minor crimes on reservations is generally considered unsatisfactory. *E.g.*, American Indian Policy Review Comm'n Report on Federal, State and Tribal Jurisdiction, 37-39 (1976).